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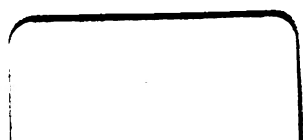
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477

THE REVISED REPORTS

BEING
A REPUBLICATION OF SUCH CASES
IN THE
ENGLISH COURTS OF COMMON LAW AND EQUITY,
FROM THE YEAR 1785,
AS ARE STILL OF PRACTICAL UTILITY.

EDITED BY
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ASSISTANT READER IN EQUITY IN THE INNS OF COURT.
BARRISTERS-AT-LAW.

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1819-1821.

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PREFACE TO VOLUME XXII.

OUR attention has been called by a subscriber to recent judicial criticisms on *R. v. Severn and Wye Ry. Co.*, 21 R. B. 433. In *Reg. v. G. W. R. Co.*, 9 R. 1, 9, the late Lord Bowen pointed out that the words in the special Act were compulsory, not merely permissive, as supposed in the report. This remark is adopted and applied in the judgment of Kay, L.J., in *Darlaston Local Board v. L. & N. W. R. Co.*, '94, 2 Q. B. 694, 704, 9 R. 712, 720. Hence the principal case is not an authority for implying a duty to the public where no such duty is expressly declared. It is to be observed that the question really argued and decided was not whether a duty existed on the part of the company, but whether the remedy by mandamus was applicable.

In the present volume there will be found a declaration by Lord Eldon as to the importance attached by the Courts to the practice of conveyancers (*Smith v. Earl Jersey*, at p. 43). The sentiment that "it might not be much amiss if courts of law would inquire a little more what has been done in courts of equity" may not be obsolete even since the Judicature Act. At any rate it has not ceased to find echoes in Lincoln's Inn. Lord Redesdale's utterance on the same point and in the same case (at pp. 54, 55) is more carefully reasoned and perhaps

more instructive. At p. 422 Best, J. points out that Nisi Prius decisions have very little authority in themselves; a warning which did not suffice to prevent many volumes of Nisi Prius decisions from being inflicted on the profession for the space of more than forty years after it was uttered.

External and domestic history have both left conspicuous marks on the law reports of this time. The case of *Butler v. Wildman*, p. 435, arose out of the South American wars of independence, while at home the unhappy event familiarly known for many years afterwards as "Peterloo" is commemorated in several places: *R. v. Hunt*, p. 485, *R. v. Parkyns*, p. 519, *R. v. Burdett*, p. 539, and finally at p. 823 (*R. v. Justices of Lancashire*), in a legally desperate attempt to obtain a criminal information against the magistrates who were answerable for the use of military force. Then the trial of Queen Caroline (*The Queen's Case*, p. 662) raised, and caused to be determined, several questions of evidence which might otherwise have remained much longer, not indeed unknown to the profession, but as it were suspended in the obscurity of Nisi Prius rulings and understandings among the leaders of circuits. *R. v. Carlile*, p. 333, shows the futility of the Act of William III. (which still disgraces the statute-book) "for the more effectual suppressing of blasphemy and profaneness." It missed its one chance of doing some good when it was decided in this case not to interfere with prosecutions for blasphemy at common law. So far as I am aware, no prosecution under the statute has ever taken place.

The case of *Ilott v. Wilkes*, as to spring-guns (p. 400), gave rise to so much controversy at the time that it may fairly be reckoned historical. Although the mischief disclosed by the case has been dealt with by statute, it has not been made an offence to pretend that spring-guns are set, and notices to that effect may still be seen now and then. I have myself seen one on Crown land in Surrey, which was afterwards removed on the attention of the proper department being called to it by a question put in Parliament at the instance of the Commons Preservation Society.

Altogether one gets, even in the colourless pages of the reporters, an ugly picture enough of the stormy ten years or more that came before the effectual movement of Parliamentary Reform: it is an atmosphere of riots, political prosecutions, court scandals, and exasperations between classes. Among the more innocent vanities of the time we meet with a "carriage called a Dennett" (see at p. 807), which appears from the Oxford English Dictionary *s.v.* to have been some slight variation of a gig.

In *Townson v. Tickell* (at p. 295) we find Manning, afterwards a serjeant and a very learned reporter, making the best of a bad case and quoting the Year-Books freely, a rare accomplishment under the Regency. That was the generation in which even Kent thought the Year-Books not worth studying or reprinting.

In *Goodman v. Sayers*, at p. 113, the Master of the Rolls allowed himself a piece of judicial plain speaking on an attempt to set aside an award: "The very definition of a good award is that it gives dissatisfaction to both parties."

Brackenbury v. Brackenbury (p. 180) and *Cecil v. Butcher* (p. 213) chronicle a curious practice of executing conveyances not intended to be taken seriously for any purpose except that of qualifying the grantee to kill game. On the facts as reported the conduct of the defendant in the first case and the plaintiff in the second appears at least unsportsmanlike; but this does not prevent the legal questions from being troublesome. In British India the conveyances on undisclosed trusts, known as *benámi*, have raised analogous questions down to the present time.

Johnson v. Dealtry, p. 306, is a rather striking illustration of the historical oddities of our local boundaries and government.

We have endeavoured to spare the reader some of the infinite superfluous commas of the reports now being reproduced, but we do not profess to have reduced their punctuation to a more modern standard with anything like uniformity or completeness. It will be observed that the slovenly and misconceived use of "such" as a demonstrative, when "that" or "the" would be better English and no less clear, is now invading the reports wholesale. As regards the Exchequer cases, Price is not the best of reporters (see *e.g.* at p. 760), but in many cases there is no other report, or no better.

F. P.

JUDGES

OF THE

HIGH COURT OF CHANCERY.

1819—1821.

LORD ELDON,† 1807—1827 . . .	<i>Lord Chancellor.</i>
SIR THOMAS PLUMER, 1818—1824 . . .	<i>Master of the Rolls.</i>
SIR JOHN LEACH, 1818—1827 . . .	<i>Vice-Chancellor.</i>

COURT OF KING'S BENCH.

SIR CHARLES ABBOTT, 1818—1832 . . .	<i>Chief Justice.</i>
SIR JOHN BAYLEY, 1808—1830 . . .	} <i>Judges.</i>
SIR G. S. HOLROYD, 1816—1828 . . .	
SIR W. D. BEST, 1818—1824 . . .	

COURT OF COMMON PLEAS.

SIR ROBERT DALLAS, 1818—1824 . . .	<i>Chief Justice.</i>
SIR JAMES ALAN PARK, 1816—1838 . . .	} <i>Judges.</i>
SIR JAMES BURROUGH, 1816—1829 . . .	
SIR JOHN RICHARDSON, 1818—1824 . . .	

† Created Earl of Eldon, July 6, 1821.

TABLE OF CASES

REPRINTED FROM

8 & 4 BLIGH; 2 JACOB & WALKER; 6 MADDOCK (to p. 218); 8 & 4 (to p. 184) BARNEWALL & ALDERSON; 2 BRODERIP & BINGHAM (to p. 315); 8 PRICE; 1 CHITTY.

	PAGE
AITKIN, <i>Re</i> , 4 B. & Ald. 47	616
Anderson v. Hamilton, 8 Price, 244, n.; 2 Brod. & B. 156, n.	751, n.
Andrews v. Dixon, 3 B. & Ald. 645	518
Anon., 1 Chitty, 506, n.	814, n.
— 1 Chitty, 536, n.	817, n.
— 1 Chitty, 572, n.	822, n.
Arnitt v. Garnett, 3 B. & Ald. 440	453
Aston v. George, 1 Chitty, 200; 2 B. & Ald. 395	803
Attorney-General v. Berkeley, 2 Jac. & Walk. 291	133
— v. Bristol (Mayor of), 3 Madd. 319; 2 Jac. & Walk. 294	136
— v. Eardley, 8 Price, 39; Daniell, 271	697
— v. Hartley, 2 Jac. & Walk. 353	167
— v. Hinxman, 2 Jac. & Walk. 270	119
— v. Lloyd, 6 Madd. 92	247
— v. Theakstone, 8 Price, 89	716
Aubin v. Daly, 4 B. & Ald. 59	623
BADGER v. Ford, 3 B. & Ald. 153	331
Batson v. Donovan, 4 B. & Ald. 21	599
Battley v. Faulkner, 3 B. & Ald. 288	390
Beckett v. Micklethwaite, 6 Madd. 199.	274
Bingham (Doe d.) v. Cartwright, 3 B. & Ald. 326	413
Birls v. Betty, 6 Madd. 90	246
Boehm v. Wood, 2 Jac. & Walk. 236	109
Brackenbury v. Brackenbury, 2 Jac. & Walk. 391	180
Bray v. Fromont, 6 Madd. 5	224
Brewster v. Sewell, 3 B. & Ald. 296	395
Bromhead v. Hunt, 2 Jac. & Walk. 459	200
Brooke v. Enderby, 2 Brod. & B. 70; 4 Moore, 501	653
Broughton v. The Manchester Waterworks Co., 3 B. & Ald. 1	278

Note.—Where the reference is to a mere note of a case reproduced elsewhere in the Revised Reports, the names of the parties are printed in italics.

	PAGE
Buckland v. Butterfield, 2 Brod. & B. 54; 4 Moore, 440	649
Burrell v. Jones, 3 B. & Ald. 47	296
Butler v. Wildman, 3 B. & Ald. 398	435
 CANNAN v. Bryce, 3 B. & Ald. 179	342
Carpenter v. Thornton, 3 B. & Ald. 52	299
Cecil v. Butcher, 2 Jac. & Walk. 565	213
Champernown v. Scott, 6 Madd. 93	248
Cholmondeley v. Clinton, 4 Bligh, 1	83
—— v. ——— 2 Jac. & Walk. 1	84
Churchill (Lord) v. Hunt, 1 Chitty, 480; 2 B. & Ald. 685	807
Clement v. Lewis, 3 Brod. & B. 297; 7 Moore, 200; 10 Price, 181	533
Clifford v. Lewis, 6 Madd. 33	228
Coffin v. Coffin, 6 Madd. 17	225
Colclough v. Sterum, 3 Bligh, 181	1
Colegrave v. Manby, 6 Madd. 72; 2 Russ. 238	245
Colston v. Morris, 6 Madd. 89	246
Crawshay v. Homfray, 4 B. & Ald. 50	618
Creak v. Capell, 6 Madd. 114	252
Cromack v. Heathcote, 2 Brod. & B. 4; 4 Moore, 357	638
Cuming v. Hill, 3 B. & Ald. 59	305
Cumming v. Forrester, 2 Jac. & Walk. 334	157
 Davidson v. Case, 8 Price, 542; 2 Brod. & B. 379	774
Dennistoun v. Lillie, 3 Bligh, 202	13
Doe d. Bingham v. Cartwright, 3 B. & Ald. 326	413
—— d. Howson v. Waterton, 3 B. & Ald. 149	328
—— d. King v. Frost, 3 B. & Ald. 546	478
—— d. Le Chevalier v. Huthwaite, 3 B. & Ald. 632; 8 Taunt. 306	508
—— d. Lovell v. Roe, 1 Chitty, 505	814
—— d. Lowe v. Roe, 1 Chitty, 506, n.	814, n.
—— d. Perkes v. Perkes, 3 B. & Ald. 489; Gow, N. P. 186	458
—— v. Rendell, 1 Chitty, 535	816
—— d. Rumford v. Miller, 1 Chitty, 536, n.	817, n.
—— d. Tarluy v. Roe, 1 Chitty, 506	815
—— d. Westlake v. Westlake, 4 B. & Ald. 57	621
 East India Co. v. Kynaston, 3 Bligh, 153	1
Ellison v. Bignold, 2 Jac. & Walk. 503	203
Emery v. Grocock, 6 Madd. 54	236
Evans v. Massey, 8 Price, 22	691
 FOLEY v. Wontner, 2 Jac. & Walk. 245	110
Fox v. Fisher, 3 B. & Ald. 135	324
—— v. Wright, 6 Madd. 111.	251
Frere v. Moore, 8 Price, 475	759
 GOODHART v. Lowe, 2 Jac. & Walk. 349	164
Goodman v. Sayers, 2 Jac. & Walk. 249	112

	PAG
Gregory v. Lockyer, 6 Madd. 90	246
Grumbrell v. Roper, 3 B. & Ald. 711	533
Guerreiro v. Peile, 3 B. & Ald. 616	500
HAMMOND v. Reid , 4 B. & Ald. 72.	629
Harrison v. Gurney, 2 Jac. & Walk. 563	211
Hawker v. Hawker, 3 B. & Ald. 537	471
Hay <i>Re</i> , <i>Ex parte</i> Smith, 6 Madd. 2; 1 Gl. & Jam.	224
Hobhouse's Case, 3 B. & Ald. 420; 2 Chitty, 215.	443
Hodle v. Healey, 6 Madd. 181	270
Home v. Bentinck, 8 Price, 225; 2 Brod. & B. 130; 4 Moore, 563	748
Horncastle v. Farran, 3 B. & Ald. 497; 2 Stark. 590	461
Howson (<i>Doe d.</i>) v. Waterton, 3 B. & Ald. 149	328
ILOTT v. Wilkes , 3 B. & Ald. 304	400
JOHNSON v. Dealtry , 3 B. & Ald. 72	306
Jones, <i>Re</i> , 1 Chitty, 651	824
— v. Bromley, 6 Madd. 137	256
KENNEDY v. Kingston , 2 Jac. & Walk. 431	197
King (<i>Doe d.</i>) v. Frost, 3 B. & Ald. 546	478
Knights v. Quarles, 2 Brod. & B. 102; 4 Moore, 532	659
LAKEMAN v. McAdam , 8 Price, 576	774
Le Chevalier (<i>Doe d.</i>) v. Huthwaite, 3 B. & Ald. 632; 8 Taunt. 306	508
Lechmere v. Brasier, 2 Jac. & Walk. 287	130
Lewis v. Clement, 3 B. & Ald. 702	530
Limbrey v. Gurr, 6 Madd. 151	262
Linwood v. Hathorn, 3 Bligh, 193	8
Lodge v. Dicas, 3 B. & Ald. 611	497
Lovell (<i>Doe d.</i>) v. Roe, 1 Chitty, 505	814
Lowe (<i>Doe d.</i>) v. Roe, 1 Chitty, 506, <i>n.</i>	814, <i>n.</i>
Lushington v. Boldero, 6 Madd. 149	261
MADRAZO v. Willes , 3 B. & Ald. 353	422
Margate Pier Co. v. Hannam, 3 B. & Ald. 266	378
Marriage v. Lawrence, 3 B. & Ald. 142	326
Marshall v. Colman, 2 Jac. & Walk. 266	116
Martin v. Mitchell, 2 Jac. & Walk. 413	184
— v. Peile, 2 Jac. & Walk. 413	184
Melville v. Hayden, 3 B. & Ald. 593	495
Merest v. James, 6 Madd. 118	253
Morse v. Merest, 6 Madd. 26	226
Mountstephen v. Brooke, 1 Chitty, 390	805
NETHERTON v. Ward , 3 B. & Ald. 21	284
Nias v. Adamson, 3 B. & Ald. 225	360
Noel v. Weston, 6 Madd. 50	235

	PAGE
OLIVER v. Court, 8 Price, 127; Daniell, 301	720
Owen v. Legh, 3 B. & Ald. 470	455
 PARRY v. Warrington, 6 Madd. 155	264
Parton v. Williams, 3 B. & Ald. 330	414
Pearson, <i>Re</i> , 4 Moore, 366	690
Penticost v. Ley, 2 Jac. & Walk. 207	104
Perkes (<i>Doe d.</i>) v. Perkes, 3 B. & Ald. 489; Gow, N. P. 186	458
Pettyt v. Janeson, 6 Madd. 146	259
Piggott v. Williams, 6 Madd. 95	248
Poor v. Mial, 6 Madd. 32	227
Powell v. Mouchett, 6 Madd. 216	276
Prendergast v. Devey, 6 Madd. 124	254
Price v. Strange, 6 Madd. 159	266
Prosser v. Watts, 6 Madd. 59	238
 QUEEN'S Case, <i>The</i> , 2 Brod. & B. 284	662
 <i>Re</i> Aitkin, 4 B. & Ald. 47	616
Reynolds v. Nelson, 6 Madd. 18	225
R. v. Bleasby (<i>Inhab. of</i>), 3 B. & Ald. 377	431
— v. Borron, 3 B. & Ald. 432	447
— v. Burdett, 3 B. & Ald. 717; 4 B. & Ald. 95; 1 St. Tr. N. S. 1	539
— v. Carlile, Mary, 3 B. & Ald. 167; 1 Cox, C. C.; 1 Chitty, 451	338
— v. ———, Richard, 3 B. & Ald. 161	333
— v. Carnarvon (<i>Justices of</i>), 4 B. & Ald. 86	636
— v. Castle Morton (<i>Inhab. of</i>), 3 B. & Ald. 588	493
— v. Devon (<i>Justices of</i>), 1 Chitty, 34	789
— v. Ferrand, 3 B. & Ald. 260; 1 Chitty, 745	373
— v. Giles, 8 Price, 293; 1 Cl. & Fin. 72	759
— v. Harrison, 1 Chitty, 571	822
— v. Hatfield (<i>Inhab. of</i>), 4 B. & Ald. 75	631
— v. Herefordshire (<i>Justices of</i>), 1 Chitty, 700	830
— v. Hunt, 3 B. & Ald. 566	485
— v. Lancashire (<i>Justices of</i>), 1 Chitty, 602	823
— v. Margate Pier Co., 3 B. & Ald. 220	356
— v. Matthews, 1 Chitty, 572, <i>n.</i>	823, <i>n.</i>
— v. Middleton, 1 Chitty, 654	826
— v. Milton, 3 B. & Ald. 112	317
— v. Parkyns, 3 B. & Ald. 668	519
— v. Tippet, 3 B. & Ald. 193	346
— v. Villers, 8 Price, 587; 11 Price, 576; Wightwick, 95	778
— v. Williams, 3 B. & Ald. 215	352
— v. Winstanley, 8 Price, 180	743
Richardson v. Moore, 6 Madd. 82	245
— v. Nourse, 3 B. & Ald. 237	368
Ricketts v. Salwey, 1 Chitty, 104; 2 B. & Ald. 361	800
Rowe v. Wood, 2 Jac. & Walk. 553	208
Rowe v. Young, 2 Brod. & B. 165	662

	PAGE
Rumford (Doe d.) v. Miller, 1 Chitty, 536, n.	817, n.
SANDERS v. King, 6 Madd. 61	240
Sargent v. Morris, 3 B. & Ald. 277	382
Shelmardine v. Harrop, 6 Madd. 39	232
Short v. M'Carthy, 3 B. & Ald. 626	503
Smith, <i>Ex parte</i> , <i>Re</i> Hay, 6 Madd. 2; 1 Gl. & Jam. 74	224
—— v. Jersey (Earl of), 3 Bligh, 290; 2 Brod. & B. 473; 5 Moore, 332	19
Snellgrove v. Hunt, 1 Chitty, 71	799
Solly v. Forbes, 2 Brod. & B. 38; 4 Moore, 448	641
Stephens v. Bridges, 6 Madd. 66	242
Stirling v. Forrester, 3 Bligh, 575	69
Stitwell v. Williams, 6 Madd. 49	235
Sutcliffe v. Greenwood, 8 Price, 535	771
Swan v. Swan, 8 Price, 518	770
TANKERVILLE (Lord) v. Wingfield, 3 Bligh, 321, n.	39, n.
Tardiff v. Robinson, 6 Madd. 83	245
Tarluy (Doe d.) v. Roe, 1 Chitty, 506	815
Teal v. Anty, 2 Brod. & B. 99; 4 Moore, 542	656
Tempest v. Fitzgerald, 3 B. & Ald. 680	526
Thompson v. Lacy, 3 B. & Ald. 283	385
Townson v. Tickell, 3 B. & Ald. 31	291
VAN SANDAU v. Corsbie, 3 B. & Ald. 13	280
—— v. Rose, 2 Jac. & Walk. 264	114
WADSWORTH v. Hamshaw, 2 Brod. & B. 5, n.	639, n.
Walker v. Wildman, 6 Madd. 47	234
Ward v. Hartpole, 3 Bligh, 470	61
Webb v. Shaftsbury (Lord), 6 Madd. 100	249
Webster v. Spencer, 3 B. & Ald. 360	427
Westlake (Doe d.) v. Westlake, 4 B. & Ald. 57	621
White v. Gerock, 1 Chitty, 24; 2 B. & Ald. 298	786
Whittell v. Dudin, 2 Jac. & Walk. 279	124
Wigley v. Ashton, 3 B. & Ald. 101	316
Wilson v. M'Math, 3 B. & Ald. 241	371
Woodbridge v. Spooner, 3 B. & Ald. 233; 1 Chitty, 661	365
Wookey v. Pole, 4 B. & Ald. 1	594
Worrall v. Johnson, 2 Jac. & Walk. 214	106
Wright v. Clements, 3 B. & Ald. 503	465
—— v. Welbie, 1 Chitty, 49	792

NOTE.

The first and last pages of the original report, according to the paging by which the original reports are usually cited, are noted at the head of each case, and references to the same paging are continued in the margin of the text.

The Revised Reports.

VOL. XXII.

IN THE HOUSE OF LORDS.

ENGLAND.—APPEAL FROM THE COURT OF CHANCERY.

EAST INDIA COMPANY *v.* KYNASTON.

(3 Bligh, 153—168.)

SEE the report of this case upon the hearing in the Court below, 19 R. R. 204 (3 Swanston, 248).

1821.

—
Lord
ELDON, L. C.
Lord
REDESDALE.
[153]

IRELAND.—APPEAL FROM THE COURT OF CHANCERY.

COLCLOUGH *v.* STERUM.

(3 Bligh, 181—192.)

A person purchasing lands under a decree is bound to see that the directions of the decree are observed.

Lands in strict settlement, with a power to grant leases, being subject to prior incumbrances, are, by a decree in a suit instituted by the incumbrancers, directed to be sold subject to the charges prior to the deed of settlement. Pending the suit, the tenant for life under the settlement grants leases not authorized by the power, and raises money upon annuities for his life, which he charges upon the lands, and they are sold subject to those charges.

Held (reversing the decree of the Court below), on a suit by the remainder-man in tail, that the sale, subject to charges not warranted by the decree, is void.

Where considerable delay has occurred in the prosecution of a suit, costs are not to be given, although the decree is reversed.

SIR VESSEY COLCLOUGH, upon his marriage in 1767, being tenant in tail of a manor and lands called Tintern, &c. subject to portions, &c. conveyed them by deeds of lease and release to a

1821.

March 9.

—
Lord
ELDON, L. C.
Lord
REDESDALE.
[181]

COLCLOUGH trustee in fee (subject to a term of one thousand years thereby
†
 STERUM. created) to the use of himself for life, remainder to the sons of
 the marriage successively in strict settlement. The incumbrances
 then affecting the estates, according to a covenant in the settle-
 [*182] ment, did not exceed 14,000*l.* The *term was created for the
 purpose of raising 3,000*l.* according to the appointment of Sir
 Vesey Colclough, and the trustees of the term had a discretion to
 raise a further sum of 3,000*l.* for the use of Sir Vesey by sale
 or mortgage; and it was provided, that the interest of the exist-
 ing incumbrances, and of the two sums of 3,000*l.* when raised,
 should be paid out of the rents and profits of the estates by the
 trustees of the term, and that Sir Vesey and the successive
 owners of the freehold for the time being should receive the
 residue of the rents and profits. By the settlement, a power was
 given to Sir Vesey of leasing for three lives, or 31 years, in
 possession, &c. for the best rent without fine, &c.

In July, 1767, the deed was registered, and a fine levied
 according to covenant. The appellant was the eldest and only
 surviving son of the marriage. The two sums of 3,000*l.* were
 raised under the power, and paid to Sir Vesey; but the trustees
 of the term permitted Sir Vesey to receive all the rents of the
 estates, and omitted to pay the interest upon any of the
 incumbrances affecting the estate.

In 1772 a bill was filed in Chancery in Ireland by the husband
 of one of the daughters of Cæsar Colclough, the grandfather of
 Sir Vesey, and others, who were entitled to prior incumbrances
 affecting the lands in settlement, praying that the debts owing to
 them, and charged on the lands, might be raised by a sale.

In 1778 a decree was made in the cause, referring it to the
 Master to take an account of the incumbrances affecting the
 lands comprised in (and prior to the registry of) the settlement
 [*183] of 1767, of *the yearly value of the lands, and the parts most
 proper to be sold. The incumbrances were accordingly
 ascertained; but the yearly value of the lands, and what parts
 were most fit to be sold, were not stated in the report.

In August, 1778, Cæsar Colclough was appointed receiver, in
 the suit instituted as before mentioned, to raise the sums charged
 upon the lands.

In 1780, by the final decree in the cause, the incumbrances mentioned in the report, amounting to 25,000*l.* great part of which was an accumulation of interest, were declared to be charges on the estates comprised in the settlement of 1767, which settlement was recited in the decree; and it was decreed that those incumbrances should be paid, or that the lands should be sold for payment. Pending the suit to raise the prior incumbrances, annuities charged on the lands for the life of Sir Vesey, and leases not authorised by the power, were granted by Sir Vesey to Cæsar Colclough, the receiver in the suit.

COLCLOUGH
v.
STERUM.

In 1781 the lands were set up to sale in the Master's office, subject to the annuities, and the leases, and were purchased by Thomas Richards. The deed by which the lands were conveyed to him recited the grants of the annuities, and that the lands were sold subject to them.

At the date of these transactions the appellant was an infant. Sir Vesey, his father, had been appointed and acted as his guardian, and among other things signed, in his name, the deed of conveyance to the purchaser under the decree. Sir Vesey died in 1794, leaving the appellant, his *eldest son, who, under the limitations of the settlement of 1767, became entitled to an estate-tail in the lands, subject to a jointure and portion.

[*184]

At the time of his father's death the appellant was a prisoner in France, and so remained until the year 1805.

In 1802 a notice was served upon the respondents, who were the co-heiresses of Thomas Richards, the purchaser, and their then intended husbands, that it was the intention of the appellant to impeach the purchase made under the decree.

The bill in the cause, which was the subject of appeal, was filed against the respondents in 1805, praying that the deeds of conveyance to Richards might be declared fraudulent, and void, that possession of the lands might be restored to the appellant; and that the respondents should account for the rents, &c. the appellant offering to pay the purchase-money, with interest.

The cause was heard in 1811 on pleadings and proofs, when the bill was dismissed. The appeal was against the decree dismissing the bill.

COLCLOUGH
v.
STERUM.

Mr. Agar, Mr. Shadwell, (Mr. Seton) for the appellant.

Mr. Wetherell, Mr. Lovat, for the respondents.

March 9. LORD REDESDALE, (after stating the facts of the case,) proceeded to the following effect :

[*185] It is to be observed, that according to the express declaration of the decree, all the debts and incumbrances subsequent to the registry of the deed of 1767, were *excluded, for the estate was thereby directed to be sold for payment of incumbrances prior to the registry of that deed. That Vesey Colclough was in distress is evident. The lands were under the dominion of a receiver ; annuities had been granted, by which they were improperly burdened ; and it was under these circumstances that the auction took place. Part of these transactions has been the subject of another suit,† in which the decree of the Court below was reversed on grounds and under circumstances in some respects, but not altogether, similar to the present case. It appears that from the death of the father in 1794, the appellant was a prisoner in France till October, 1805. A part of this estate was sold to a Mr. Richards, and the transaction is impeached on the ground of fraud ; the purchaser having obtained the estate at an under-value was held a party to the fraud, whether personally, or by the medium of an agent, is immaterial. The estate was put up to sale subject to two annuities granted by Sir Vesey Colclough to Cæsar Colclough, for the life of Sir Vesey. It is clear that such a sale was not warranted by the decree, which included only incumbrances prior to the settlement of 1767, rejecting those which were subsequent. It appears to me that the appellant was injured by the sale subject to those annuities during the life of his father, which reduced the value of the estate to that extent, and which induced the party to buy the annuities at a sum greater than was advanced to Sir Vesey Colclough. To the *extent of those sums at least the estate was injured in value.

[*186]

It is argued that persons purchasing under the authority of a decree ought to be safe ; but it is a settled maxim of equity, that

† *Colclough v. Bolger*, 16 R. R. 24 (4 Dow, 54).

persons purchasing under decrees of the Court are bound to see that the sale is made according to the decree. In a case, the name of which I do not at this moment recollect, it was laid down by Lord **HARDWICKE**, that it was the business of a purchaser to see that the persons who had the right to convey were before the Court. If he takes a title which a decree in an imperfect suit does not protect, he must abide the consequence.† On these principles the appellant has a right to impeach the transaction. The decree protects parties only according to its terms. The provision of the decree was, that the estate was to be sold, subject to incumbrances prior but not subsequent to the settlement of 1767. And as to these latter incumbrances, the decree directed that the estate should be free from them. On this account the judgment is erroneous, and the purchase is with notice, because the title is founded on the decree: the purchaser had, moreover, full notice of the settlement, because it is recited in his conveyance. Such a sale, therefore, cannot be protected by the decree. Another objection to the proceeding is, that the estate was sold subject to leases which had been granted under pretence of the power, but were in fact contrary to it. It is probable, from circumstances established in evidence *that the leases were fraudulently granted by Sir Vesey Colclough; that the purchaser had notice of the undervalue there is strong circumstantial proof, sufficient to impeach the transaction on that ground. It is not, however, necessary to resort to the ground of fraud; and without resting my opinion at all on that circumstance, but confining my view solely to the fact that this sale was made subject to the annuities, I think the decree is wrong: that is a clear ground; the other might require further investigation. Instead of dismissing the bill, the Court below ought to have granted relief. The consequence, if the sale is to be impeached, will be that the estate must be held by the trustees only as a security for the money paid into Court upon the purchase, with interest. The purchasers must, under the circumstances, be answerable for the rents of the estate from the death of Sir V. Colclough, not at an earlier period, though Sir V. Colclough was bound to keep down the interest of incumbrances. The rents and profits must be set

COLCLOUGH
v.
STERUM.

[*187]

† See 16 R. R. 24, n.—O. A. S.

COLCLOUGH ^{v.} STERUM. against the principal and interest, and the balance paid into Court. The estate must be re-conveyed to the appellant under the settlement of 1767. As to the lease subsequently granted by Sir V. Colclough being without consideration, and charged to have been fraudulently done by the aid of the receiver, the estate must be relieved from that incumbrance. As to the other leases, if they can be impeached, he may, as tenant in tail, try that question in a court of law. The decree must be reversed, with a direction that the respondent is liable for the rents, but that the purchase-money is a lien upon *the estate. The rent to be charged ought not to be higher than what is reserved upon the lease. On payment of the balance (if any) of the purchase-money above the rent, the respondent must re-convey the estate to the appellant, in tail, with remainders, according to the settlement.

[*188]

THE LORD CHANCELLOR :

If this decree is to be reversed it may be expedient to delay the final settlement of the order, that the parties may have the opportunity of suggesting any correction of the minutes, or supplying any defects.

The reversal of the decree may be a hardship upon the present respondent ; but if justice requires such a measure, the consideration of hardship must be disregarded. The decree cannot be supported unless the doctrines of equity in Ireland differ from those in England. Sales under decrees are entitled to protection when they are conformable to the decree, but not otherwise. It might be consonant to moral justice to set a value upon the annuities, and add that value to the purchase-money ; but where parties have made a purchase contrary to the authority of the decree they cannot be permitted afterwards to conform for the purpose of taking the benefit of the decree. As to the lease, the main defect is the under-value. In other respects there is strong ground for suspicion, but that is not a safe ground for decision. Judicial acts, in cases of fraud, must rest on clear evidence. By the decree, the Master was directed to inquire what parts of the estate were most fit to be sold. No report was made on that point : but whether that defect

*ought to affect the purchaser may be questionable, since the Court itself ought to have noticed that defect in their proceedings. But the decree reciting the settlement directs a sale of the estates subject to incumbrances of a particular period. The estates are in part sold subject to after incumbrances, in which the purchasers had an interest, and directly contrary to the decree. The loan of money—the purchase of annuities—the leases at undervalue, and other circumstances appearing on probable evidence, furnish grounds of suspicion. But at all events it is clear that a decree not obeyed, but violated, cannot be a protection to a purchaser.

COLCLOUGH
v.
STEBUM.
[*189]

LORD REDESDALE :

The length of time which has occurred between the death of Sir Vesey Colclough and the filing of the bill is a reason why costs should not be given.

By the formal order of the House, dated the 14th of March, 1821, it was ordered and adjudged that the decree complained of in the appeal be reversed, that the sale of the lands in the pleadings mentioned, ought to be deemed fraudulent and void against the appellant and be set aside, so far as this affected the interests of the appellant and the person claiming under him; and that the deeds of conveyance in question should stand as securities only for the sums actually paid under orders of the Court of Chancery with interest from the death of Sir V. Colclough; setting off the rents for the same period.

1821.
 March 19.
 —
 Lord
 ELDON, L.C.
 [193]

SCOTLAND.—APPEAL FROM THE COURT OF SESSION.

LINWOOD *v.* HATHORN.

(3 Bligh, 193—201.)

An appeal, in which the essential parties are not served with the peremptory order to answer, and do not appear at the hearing, cannot proceed as against one of the respondents.

Agents and servants acting under general orders, but without the special direction of their master, having cut a tree on the side of a public road, which in falling killed a passenger, the widow and children of the person killed brought an action for damages against the master and the servants, in which action there was a judgment for the defendants. On appeal against this judgment, the agents and servants, as well as the master, were named as parties in the appeal, but were not served with the peremptory order to answer the appeal, nor brought before the House as parties at the hearing. The proceeding was held defective on this ground, as it would deprive the master of the remedy over or relief against the agents and servants, in case of a reversal of the judgment as against the master alone.

But the Lords, on hearing the argument *ex parte* against the absent respondents, being of opinion that the judgment of the Court below ought to be affirmed, the House affirmed it accordingly.

[194] THIS action was instituted in the Court of Session in Scotland, by the appellants, in order to obtain an assythment † or reparation for the loss which she and her children have sustained by the death of John Linwood, which was occasioned by the fall of a tree cut down upon the estate of Garthland, belonging to the respondent, Mr. Vans Hathorn.

The tree was about eighteen inches diameter, and situated on a part of the property of Garthland, only a few feet removed from the public highway leading from the Mull of Galloway to the market town of Stranraer. It was cut on the 27th November, 1812, which happened to be a market-day at Stranraer. Mr. Linwood was riding along the road about mid-day on his way to the market, in company with three neighbouring farmers. No person was placed upon the road, or elsewhere, to give notice of danger, and no rope or other instrument employed to direct the fall of the tree; M'Kie and Graham were in the act of cutting it, and a strong wind was blowing from the east,

† That is, an action for damages land, under Lord Campbell's Act, similar to the remedy given, in Eng- 9 & 10 Vict. c. 93.—R. O.

on which side of the road the tree was standing, when Mr. Linwood and his companions rode up; the tree giving way at the moment when he was passing, fell upon him and bruised him so severely, that he expired in less than an hour after the accident.

LINWOOD
v.
HATHORN.

The appellants, the widow and children of Mr. Linwood, instituted an action, in which they called as defenders Mr. Vans Hathorn, the proprietor, together with John Hathorn, William Reid, Peter M'Kie and John Graham, who, as the appellants *alleged, were all concerned in the transaction as the agents and servants of Mr. Hathorn.

[*195]

The summons concluded, that these several persons "ought and should be decerned and ordained to make payment, conjunctly and severally, to the pursuers, of the sum of 2,000*l.* sterling as a reparation to them of the great loss and damage which they have sustained, and will sustain, by the said John Linwood being deprived of his life in manner aforesaid," besides expenses of process, and of extracting the decree.

Parties having been heard, and the appellants having put in a condescendence by appointment, which was followed with answers, Lord Craigie (Ordinary) allowed them a proof of their allegations. Accordingly a proof was led as to the facts founded on in support of the action.

The proof given on the part of the pursuers related, 1. To the situation, and the fact of cutting the tree; the improvident manner in which it was done, and the accident consequent upon it. 2. That the other parties acted under the orders of Mr. Vans Hathorn. On this point the proof did not go to any particular order as to the tree in question, but only as to general agency and management. 3. As to the situation, character and circumstances of Mr. Linwood, as a foundation to estimate the damages sustained. This part of the proof consisted chiefly of his skill as a farmer; his age; the duration of an unexpired lease, and his average farming profits.

Distinct from the pecuniary damage, the appellants claimed consideration of a *solatium* due to the family for the loss of a husband and parent.

The proof having been concluded, and the term for proving

[196]

LINWOOD
v.
HATHORN.
1816.
Jan. 16.

circumduced, the Lord Ordinary appointed the parties to prepare memorials upon the whole cause, and thereafter he pronounced the following interlocutor: "Having considered the memorial for the pursuers, also the memorial for the defender, Mr. Vans Hathorn, separate memorial for William Reid, another of the defenders (no memorial having been given in for Peter M'Kie and Matthew Graham, also defenders, nor for John Hathorn, who is now dead,) with the proofs brought by the parties, writings produced, and former proceedings, appoints the parties to prepare, print, and box informations, betwixt and the first sederunt day in February next, and makes avizandum with the cause to the Lords of the Second Division of the Court; and at the same time appoints the proofs and writings founded on by the parties, to be printed and annexed to the information for the pursuers, the expense of printing the proofs and writings founded on, in the mean while, to be defrayed equally by the parties."†

Informations were prepared in obedience to appointment; and thereafter the following interlocutor was pronounced: "The Lords, on report of Lord Craigie, and having advised the informations for the parties, sustain the defence, assoilzie the defenders, and decern."

1817.
May 14.
[*197]

The appellants submitted the case to the review *of the Court in a reclaiming petition, which was appointed to be answered, but "the Lords having advised this petition, with the answers thereto, for the defenders, adhered to the interlocutor reclaimed against, and refused the desire of the petitioners."

The appellants, conceiving themselves to be aggrieved, appealed against the above-recited interlocutors.

* * * * *

[198]

Mr. Wetherell, Mr. Oliphant, for the appellants.

The Attorney-General, Mr. C. Warren, for the respondents.

All the parties in the suit below were named in the petition of

† A note, explanatory of his view of the case, was subjoined by the Lord Ordinary to this interlocutor.

For the argument in the Court below, and the opinion of the Judges, see Fac. Coll. 1815, 1819, No. 115.

appeal; but none of them had been served with an effectual order to answer the appeal; and on the hearing of the appeal Vans Hathorn only appeared. There was, therefore, no effective appeal against the other respondents: Graham, the party immediately concerned in the act, was one of them. In this state of things it was urged, on the *behalf of the appellants, that the condition of the summons being joint and several, relief might be had against any one or more.

LINWOOD
v.
HATHORN.

[*199]

[During the argument, the LORD CHANCELLOR made the following observations:]

The case must be considered as heard *ex parte* against all the parties but Vans Hathorn. With respect to the other parties, the peremptory order has not been served or applied for; they are not before the House, and the appellants are not entitled to be heard as against them. The summons says that Graham was acting for the behoof or under the directions of Vans Hathorn, or John Hathorn, or W. Reid, or P. M'Kie: of such an allegation the sufficiency might be questioned. Proof that Vans Hathorn gave authority to any of them makes a different case. Where a judgment is given against several defendants, the plaintiff may take execution against one, and for the one who pays the damages the judgment itself and the fact of payment is evidence against the others for the purposes of contribution; but where there is a judgment of acquittal, the difficulty is great. The Master, in such a case, could never proceed against a servant who has been absolved by verdict. The conclusion of the summons is joint and several. But suppose an action against a coachmaster and a coachman, and an acquittal by verdict, could the master afterwards proceed against the servant? There is another way of viewing the case: if Vans Hathorn is liable, Graham also may be liable to him, and he might recover over against *Graham; if, therefore, the appeal is given up as against Graham, how can it proceed against Vans Hathorn?

[*200]

A question then arose, whether the appellants paying the costs of the hearing should have liberty to bring all the parties before the House? The respondent's counsel, the question being

LINWOOD
HATHORN.

put to them by the Lord Chancellor, were not willing to assent to this proposal, and the cause having been fully argued, stood over for consideration.

1821.
March 19.
—

THE LORD CHANCELLOR :

In the course of hearing this cause a question presented itself, whether it was possible that we could proceed to determine it without bringing before the Court third persons who were not effective parties to the appeal at the time when the cause was heard at the Bar? It was at first thought by the House that the cause might stand over, with liberty for the solicitor to apply for leave to bring those parties before the House; that suggestion being made without prejudice to the question, whether, according to the course of practice of the House, such a petition could now be available? Upon further consideration, however, it seemed expedient to go on to the extent to which the argument could go at the Bar, as it might turn out that the opinion of the House might be, that if those parties had been here the judgment could not be reversed. Having attended to all the circumstances of the case, with all the feeling which belongs to it, and the consequences to the appellant of the unfortunate accident out of which the cause arises, it does not appear to me that there is sufficient reason to advise the House to reverse the judgment; and I think we may venture to proceed in the present state of the cause, in respect of parties. It would probably have made no difference, as to the result, if the other parties had been here; because, in the circumstances of the case, it appears to me that the same judgment would have followed. The ordinary question being put, that the judgment should be reversed, I must humbly express my opinion that it ought to be affirmed.

[*201]

Judgment affirmed.

SCOTLAND.—APPEAL FROM THE COURT OF SESSION.

DENNISTOUN *v.* LILLIE.

(3 Bligh, 202—210.)

Agents of the owners of a ship, by a letter, saying, “The *Brilliant* will sail from Nassau for Clyde on the 1st of May, a running ship,” instruct their correspondents to effect an insurance on the ship, which is done accordingly by them, showing this letter to the underwriters. There being a favourable opportunity of convoy, the ship sailed on the 23rd of April. On the 11th of May she was captured: Held, in the Court below, and on appeal, that the expression of the letter was positive, and not the statement of an expectation; and that the exhibition of the letter being a representation material to the risk covered by the policy, which was not true in fact or in the event, vitiated the policy.

UPON the 17th of June, 1814, the appellants, Messrs. Dennistoun, Buchanan & Company, merchants in Glasgow, received a letter of advice from Messrs. William Duff & Company, their correspondents at New Providence, dated 2nd April, 1814, containing copies of their letters to the appellants of the 19th and 24th of March preceding.

The following are extracts of such parts of the letters as relate to the subject of insurance. By the *letter of the 19th March the appellants are informed thus: “At a prize sale of a South Sea whaler and her cargo of oil, that took place here yesterday, we purchased on your account about 40,000 gallons of spermaceti oil, at 3s. 9½d. sterling per gallon; 14,000 gallons of which we intend to ship upon that remarkable fast-sailing schooner *Brilliant*, of 157 tons burthen, mounting six nine-pounders, to sail, with or without convoy, about the first of May; and on the value of which shipment you will please to make insurance. Messrs. Seton and Elliot will ship on board the *Jessie* 60,000 lbs. St. Domingo coffee, which they wish you to have insurance done for at 50s. per 100 lbs., and 17,000 lbs. Cuba coffee, at 60s. per 100 lbs. They also wish you to have insurance effected on the *Brilliant* from hence to Greenock, valuing her at 1,400l. sterling; to all of which we beg your attention.” The letter of the 24th says, that the *Brilliant* would be cleared out as bound to Greerock and a port on the Continent. And in the letter of 2nd April

1821.

March 19.

April 5.

Lord

ELDON, L.C.

[202]

[*203]

DENNISTOUN Messrs. Duff & Company state, towards the conclusion of the
 v. letter, which relates to a variety of other matters, "The *Brilliant*
 LILLIE. will sail on the 1st of May, a running vessel, in which the writer
 of this will take his passage."

[*204] Upon these advices an insurance was effected, on ship and
 goods, on the 18th of June, being the day after receiving the
 letters above quoted, although the contract or policy bears date
 on the 21st of June, three days later. At the time of entering
 into the contract the letters of advice were shewn to the respon-
 dents, who were some of the underwriters *at Glasgow, with
 whom the insurance was effected.

The terms of the policy were, "From Nassau to Clyde, with
 leave to call at all ports and places whatsoever, for convoy, or for
 any other purpose whatever, without being deemed a deviation ;
 and with or without letters of marque, leave to chase, capture,
 man and convoy, or send into port or ports, any vessel or
 vessels."

The insurance was done at the rate of six guineas per cent.
 to return three pounds per cent. "for convoy for the voyage, or
 two pounds per cent. for partial convoy and arrival."

About the 20th of April His Majesty's ship *Martin* came into
 the harbour of Nassau, and being bound for Halifax, the com-
 mander offered to take the *Brilliant* under his protection. This
 being considered a great advantage, as the risk of capture
 between Nassau and Halifax was imminent, extraordinary
 exertions were used to complete the loading of the *Brilliant*, and
 she sailed under convoy of the *Martin* on the 23rd of April, being
 about eight days earlier than the date of sailing proposed in the
 foregoing letters.

Upon the 11th of May the *Brilliant* was captured by an
 American privateer, and carried into Boston.

[*205] When the intelligence of the capture arrived, the appellants
 applied to the underwriters, and many of them settled the loss.
 But the respondents resisted payment ; whereupon the appellants
 brought an action before the Court of Admiralty, concluding for
 payment of the sums respectively underwritten for them ; and,
 after the usual pleading, the Judge Admiral pronounced the
 following interlocutor : * "The Judge Admiral, having advised

the libel, defences, answers, replies, and writings produced, finds, that by a letter, dated the 19th of March, 1814, from William Duff & Company, the correspondents of the pursuers, of New Providence, to them, they mentioned the ship *Brilliant*, a remarkable fast-sailing schooner, was to sail, with or without convoy, about the 1st of May; and that by an after letter dated the 2nd of April last, 1814, the incorrectness of the word 'about,' as applicable to the 1st of May, was explained by the same correspondents informing the pursuers that the *Brilliant* was to sail for New Providence on the 1st of May, a running vessel, 'and in which the writer of this (William Duff) will take his passage:' Finds it admitted, that these letters were communicated to the defenders, whereby they saw that the vessel was positively intended to remain in New Providence, and not to sail therefrom till the 1st of May last, and under this impression subscribed the policy in question: finds, that the *Brilliant* sailed on the 23rd of April from New Providence, and, for anything known, may have been captured before the 1st day of May, when she was held forth to the defenders as remaining in the harbour: finds, therefore, that although the representation made by the pursuers was absolutely innocent on their part, the fact stated by them to the defenders was not verified, and a material change was thereby made in the risk undertaken by the latter; and therefore assoilzies the defenders, and finds them entitled to expenses."

DENNISTOUN
v.
LILLIE.

The appellants brought the foregoing interlocutor under review of the Judge Admiral, by petition, and the interlocutor thereon was, "The Judge Admiral having advised this petition, and another dated 23rd February last, with the writings produced, remains of the same opinion, that the risk which the underwriters undertook, being confessedly that on a vessel to sail on the 1st of May, was perfectly different from one on a vessel which sailed on the 23rd April, inasmuch as the defenders undertook a risk on a vessel understood to be in the harbour, and safe on the 1st of May, when in fact she had been eight days at sea, refuses this petition, and adheres to the interlocutor complained of."

[206]

"Note.—The petitioners do not seem to dispute, that if the

DENNISTOUN
v.
LILLIE. vessel had been taken before the 1st of May they would have had no argument. They however state that the vessel was not captured till 11th May. This, in real reasoning makes no difference, since it is a thousand chances to one that if she had not sailed till 1st May she would not have fallen in with the vessel which took her. The case of a vessel sailing the day before she is represented to sail is quite different from that of a ship being detained by unavoidable accidents beyond that day. In fact, it is an insurance on a vessel in jeopardy, when she is represented to be comparatively safe." And on the 19th of April, 1815, the Judge Admiral modified the defenders' account of expenses to 10*l.* 1*s.* 4½*d.*, and decerned against the appellants for payment of the same, and for the fees of extracting the decree.

[207] The appellants pursued an action of reduction before the Lords of Council and Session of the foregoing interlocutors pronounced by the Judge Admiral. This action was discussed before Lord Pitmilley, Ordinary, who pronounced an interlocutor, repelling the reasons of reduction, &c.

The appellants submitted the question to review in a representation, to which answers were given in; but the Lord Ordinary adhered to the interlocutor.

The appellants then brought these interlocutors under review of the Second Division of the Court of Session by a petition. The Lords adhered to the interlocutors complained of, &c.

The appeal was against the foregoing interlocutors.

On the part of the appellants distinctions were taken between a warranty and a representation,[†] and it was contended that the letters exhibited did not amount to a warranty, or anything more than a representation, which was not material; and that the statement of a future event, as an intended day of sailing, can be no more than an expectation.—*Bowden v. Vaughan*; [‡] *Hubbard v. Glover*; [§] *Barber v. Fletcher*; ^{||} *Bize v. Fletcher*. ¶ It was *further argued, that the representation not being made

[*208]

[†] *Pawson v. Watson*, Cowper, 790; Park on Insurance, cc. 10, 18; Marshall on Insurance, c. 9.

[‡] 10 R. R. 340 (10 East, 415).

[§] 3 Camp. 313.

^{||} Doug. 305. In this case the word "expected" was used.

¶ Doug. 271. See also Park on Insurance.

malâ fide, the policy was not vitiated by such a misrepresentation. DENNISTOUN
v.
LILLIE.

For the respondents it was contended, 1. That the day of sailing was a fact material to the risk, and being within the control of the appellants, a statement of intention was equivalent to a statement of fact. 2. That the vessel having sailed on the 23rd of April, was, at the time when the insurance was effected, what is termed "a missing ship."—*Ratcliffe v. Shoolbred*.†

The *Attorney-General*, Mr. *Abercrombie*, for the appellants.

Mr. *Wetherell*, Mr. *Denman*, for the respondents.

[In the course, and at the conclusion of the argument, the LORD CHANCELLOR made the following observations:]

The second letter, in which it is expressed that the vessel will sail on the 1st of May, was shewn to the underwriters, and is it not the same thing whether the party means to misrepresent, or whether the thing actually communicated is a misrepresentation? The authorities turn upon the difference between expectation and representation. In the case of *Barber v. Fletcher* the representation is, that the ship is *expected* to sail. If the accuracy of a representation as to time is to be given up, that doctrine must apply equally to the question *of place. The letter of the 2nd of April speaks in terms of uncertainty as to the sailing of the *Dart* and the *Jessie*, but as to the *Brilliant* the statement is positive. Do the appellants carry their arguments so far as to assert, that in cases which go beyond expectation, where there is a misrepresentation of a material fact, without a warranty or *mala fides*, the policy, according to the authorities, is not vacated? In the case of such a misrepresentation, *mala fides* is not necessary to render the contract inoperative. The principle of the judgment is the same in all the cases, although we cannot agree in all the decisions. The principle, and the application of the principle, are different things. To maintain the argument for the appellant it is necessary to contend, that if the vessel had

[*209]

† Park, 8th ed. p. 413; Marshall, 4th ed. p. 359.

DENNISTOUN been captured on the 24th of April the underwriters would have
 v.
 LILLIE. been liable.

March 19. THE LORD CHANCELLOR:

This case resolves itself into two questions:—first, whether the representation was made, of which there is no doubt; and secondly, whether it is a representation of an expectation, or a statement as of a past fact, which is material to the risk.

I have formed an opinion upon the subject, but wish to give it further consideration; and this is the more necessary, as this branch of law is not well understood in Scotland. The case is to be determined upon a consideration of the facts, as a jury would decide under the direction of a judge as to the law applicable to those facts. The question for a jury would be,
 [210] Was there in this case a misrepresentation *of a material fact affecting the risk covered by the policy.†

THE LORD CHANCELLOR:

In the absence of the noble Lord † who was present at the hearing of this appeal, and by his desire, I suggest, that upon inspection of the policy of insurance (which is not sufficiently stated in the printed cases), it appears to be a policy upon the ship as well as goods. It is not therefore like the case of *Bowden v. Vaughan*, which was cited on the argument. In that case the policy was effected by the owner of goods, and on goods only. If there should be any desire to make further observations on the matter of the policy, they may be suggested at the meeting of the House on Wednesday.

April 5. THE LORD CHANCELLOR (after stating the question on the appeal):

There is a difference between the representation of an expectation and the representation of a fact. The former is immaterial; but the latter avoids the policy if the fact misrepresented be material to the risk. After the most attentive

† Before the motion for judgment was finally made, the LORD CHANCELLOR intimated that the House would (if desired) hear a further

argument on the terms of the policy; but the proposal was declined by the agents.

‡ Ledesdale.

consideration of the case it appears to me that the judgment of DENNISTOUN
the Court below is right.

v.
LILLIE.

Judgment affirmed.

ENGLAND.—APPEAL FROM THE EXCHEQUER CHAMBER.†

1821.

SMITH *v.* THE EARL OF JERSEY.

(3 Bligh, 290—469; S. C. 2 Brod. & Bing. 473, 5 Moore, 332.)

Lord
ELDON, L.C.
Lord
REDESDALE.

A power reserved upon a marriage settlement to tenants for life to grant or renew leases for lives, provided that a right of re-entry is reserved upon such leases for non-payment of rent, is well executed by a lease for lives providing a re-entry in case the rent remains in arrear fifteen days, and there is no sufficient distresses on the premises.

[290]

GEORGE, Earl of Jersey, Edward Ellice, and Alexander Murray, brought an ejectment in the Court of King's Bench in Michaelmas Term, 1813, against Henry Smith, for the recovery of a tenement, with the appurtenances, called Tal-y-Coba-Uchaf, in the parish of Lansamlet in the county of Glamorgan, then in the possession of Henry Smith. There were two demises laid in the declaration; the first on the 11th July, 1813, and the second on the 11th January, 1814. Henry Smith defended and pleaded the general issue.

[293]

At the Summer Assizes in the year 1815, the cause was tried before Baron Wood, at Hereford, when a special verdict was found, stating in substance as follows :

That the Honourable Bussey Mansel, afterwards the Right Honourable Bussey Lord Mansel, Baron Mansel, of Margam, in the county of Glamorgan, being seised in fee of the premises in the declaration *mentioned, being a tenement called Tal-y-Coba-Uchaf, made his will, dated the 11th December, 1749, by which he devised the said tenement, amongst other things, in remainder, after certain limitations which never took effect, to his daughter, Louisa Barbara, for life, with remainders over; and a power to her in consideration of marriage, either before

[*294]

† The proceedings in the Exchequer Chamber are reported in 1 Brod. & Bing. 97, under the name of *Doe d. Earl of Jersey v. Smith*; also in 7 Price, 281, and 3 Moore, 339. The proceedings on the original hearing in the King's Bench, in 5 M. & S. 467.—R. C.

SMITH
v.
EARL JERSEY or after marriage, of revocation and appointment, as afterwards pursued by her in the deed of settlement hereafter mentioned.

That Lord Mansel died on the 29th of November, 1750, seised as aforesaid, without altering his will as to the said premises, leaving his daughter Louisa Barbara, his only child, him surviving, seised for life of the said premises.

That the said Louisa Barbara, on the 20th July, 1757, intermarried with George Venables Vernon, the younger, afterwards the Right Honourable George Venables Vernon, Lord Vernon, Baron of Kinderton, in the county of Chester.

That before the said marriage, the said Louisa Barbara, being seised as aforesaid, by deed dated the 2nd July, 1757, in conformity with the said power in the said will of the said Lord Mansel, and in consideration of the said marriage, revoked the uses and devises contained in the said will concerning the said premises and appointed and limited the same to Francis Earl of Guildford and Charles Montague, and their heirs, in trust, to hold the same to the same uses as before limited until after the said marriage, and then to the uses of the said George Venables Vernon for life, without impeachment *of waste, remainder to the said Louisa Barbara for life, without impeachment of waste, and in the mean time to the said Francis Earl of Guildford and Charles Montague, and their heirs, to preserve contingent remainders; and to permit the said George during his life, and afterwards the said Louisa Barbara during her life, to take the rents, &c.; and after the decease of the survivor of them, to divers other uses for the benefit of their issue; and in default of issue, to the use of the will of the said Louisa Barbara, and subject to the powers and limitations to be thereby directed and appointed; and in the mean time to the use of the said Louisa Barbara, her heirs and assigns, for ever.

[*295]

In the said deed was contained a leasing power in these words: " Provided always, and it is hereby further declared and agreed, by and between the said parties to these presents, that it shall and may be lawful to and for the said George Venables Vernon the younger, and Louisa Barbara Mansel, his intended wife, from time to time, during their respective lives, when and as

they shall respectively be in possession of or entitled to the perception of the rents and profits of the manors, messuages, lands, hereditaments and premises, so limited to them for their respective lives as aforesaid, by indenture or indentures, under their respective hands and seals, attested by two or more credible witnesses, to demise, lease, or grant such part or parts of the said manors, messuages, lands, tenements and hereditaments, or parts or shares of manors, messuages, lands, tenements, hereditaments *and premises, whereof they shall be so respectively in possession or entitled to the perception of the rents and profits as aforesaid, as now are leased for life or lives, or for years determinable on the dropping of a life or lives, to any person or persons, in possession or reversion, for one, two, or three lives, or for any number of years determinable on the dropping of one, two, or three lives, so as there be not on any part or parcel of the same premises to be demised, leased, or granted respectively, for a life or lives, or for years determinable on the dropping of a life or lives as before mentioned, any greater estate or interest subsisting at any one time than what will wear out or be determinable on the dropping of three lives, and so as on every such respective lease, demise, or grant for a life or lives, or for years determinable on the dropping of a life or lives, there be reserved and made payable during the continuance of the estates and interests thereby to be demised, leased, or granted respectively, the ancient and accustomed yearly rents, duties, and services, or more, or as great or beneficial rents, duties and services, or more, as now are, or at the time of demising or granting the premises so to be demised, leased, or granted respectively, were reserved or made payable for or in respect of the same premises respectively, or a just proportion of such ancient or the present reserved rents, duties, and services, or more, according to the value of the premises so to be demised, leased or granted respectively (except heriots, which shall *or may be varied, or altered or compounded for, according to the will and pleasure of the said George Venables Vernon the younger, and Louisa Barbara Mansel), all such rents, duties, and services respectively, to be incident to and go along with the reversion and remainder of the same premises, expectant on the determination of the said

SMITH
v.
EARL JERSEY

[*296]

[*297]

SMITH
v.
EARL JERSEY

respective demises, leases, and grants thereof, and so as there be contained in every such lease a power of re-entry for nonpayment of the rent thereby to be reserved ; and so as the respective lessees to whom such lease or leases shall be made as aforesaid be not, by any express clause to be contained in any such leases respectively, freed from impeachment of waste ; and so as the said respective lessee or lessees, to whom any such lease or leases shall be made respectively as aforesaid, doth and do seal and deliver a counterpart or counterparts of such lease or leases respectively : and also by indenture or indentures under their respective hands and seals, attested as aforesaid, to demise, lease, or grant all or any of the said manors, messuages, lands, hereditaments and premises, and parts and shares of manors, messuages, lands, hereditaments and premises, or any of them, so limited to them the said George Venables Vernon, the younger, and Louisa Barbara Mansel, his intended wife, for their respective lives as aforesaid, for any term or number of years absolute, not exceeding twenty-one years, to take effect in possession, and not in reversion, or by way of future interest, so as upon every such *lease for an absolute term not exceeding twenty-one years there be reserved and made payable, during the continuance of such lease or leases, so much or as great and beneficial yearly and other rent and rents, and other services proportionably, as now is and are therefore paid and yielded, or the best and most improved yearly rent and rents that can be reasonably had or obtained for the same, without taking any fine, premium, or fore-gift, or any thing in the nature or in lieu thereof, to be incident to and go along with the reversion and remainder of the same premises expectant on the determination of the said respective leases ; and so as the respective lessees, to whom such lease or leases shall be made, be not, by any express clause to be contained in any of such leases respectively, freed from impeachment of waste ; and so as the said respective lessee and lessees, to whom any lease or leases shall be made respectively as aforesaid, doth and do seal and deliver a counterpart or counterparts of such lease or leases respectively ; and so as in every such lease for any term of years absolute respectively there be contained a clause of re-entry, in case the rent or rents

[*298]

thereupon to be reserved, be behind or unpaid by the space of twenty-eight days after the times thereby respectively appointed for payment thereof: And also by indenture or indentures under their respective hands and seals, attested as aforesaid, to demise, lease, and grant all or any part of the lands, hereditaments and premises so limited to them the said George Venables Vernon the younger, and *Louisa Barbara Mansel, his intended wife, for their respective lives as aforesaid, wherein or whereupon any mine or mines now is or are open, or wherein or whereon any person or persons shall be willing to open any mine or mines, sough or soughs, or other thing or things whatsoever, which may be requisite and necessary for the digging and getting of lead or copper ore, or any metal or mineral whatsoever, unto any person or persons, for any term or number of years not exceeding thirty-one years, to take effect in possession and not in reversion, or by way of future interest; and so as upon every such lease for an absolute term, not exceeding thirty-one years, there be reserved and made payable, during the continuance of such lease or leases, such part or share of the lead, copper ore, coal, and other produce to be gotten from the said mines, or such yearly rent or income in respect thereof, as can reasonably be had or obtained for the same, without taking any fine, premium or fore-gift, or anything in the nature or in lieu thereof, to be incident to and go along with the reversion and remainder of the same premises expectant, on the determination of the said respective leases; and so as the respective lessees to whom such lease or leases shall be made, be not, by any express clause to be contained in any of such leases respectively, freed from impeachment of waste, other than in the necessary and reasonable winning or working thereof; and so as the said respective lessee and lessees, to whom any lease or leases shall be made respectively as aforesaid, doth and *do seal and deliver a counterpart or counterparts of such lease or leases respectively; and so as there be also inserted such proper and usual covenants for the effectually winning and working the said mines and smelting the ore, and doing all other proper and necessary acts, as are usually inserted in leases of the like nature."

SMITH
v.
EARL JESSEY

[*299]

[*300]

The said George Venables Vernon after the said marriage

SMITH became seised for life of the said premises, and entitled to the receipt of the rents, &c.
v.
EARL JERSEY

Before the making the said deed of settlement, and until the surrender hereafter mentioned, the said premises were under lease for a term of years determinable on the lives of three persons, who died before the 11th day of July mentioned in the declaration.

On the 5th September, 1803, the said George Venables Vernon being seised of the said premises as aforesaid, and entitled to and in receipt of the rents, &c. by an indenture of lease between him (then Lord Vernon) of the one part, and Charles Smith (since deceased), and the said Henry Smith of the other part, in consideration of the surrender of the said former lease, and of 105*l.* paid to the said Lord Vernon by the said Charles and Henry Smith, and of other matters in the said indenture specified, let the said premises called Tal-y-Coba-Uchaf to the said Charles Smith and Henry Smith, their executors and administrators, for ninety-nine years from the date of the said indenture, if the said Charles Smith, Henry Smith, and John Smith, son of the said Charles, or either of *them, should so long live, yielding therefore to the said Lord Vernon, &c. the yearly rent of 2*l.* at Michaelmas and Lady Day, and one couple of fat capons on the first of January yearly, during the term, or 1*s.* 6*d.*, in lieu, at the election of Lord Vernon, &c., also the heriots and services in the said indenture specified.

[*301]

The said indenture contains a covenant by the said lessees for the payment of a proportion of the said reserved rent, in case the term should determine between any of the days of payment by the death of the persons named in the said lease; also a covenant by the said lessees for the payment of the said yearly rent of 2*l.*, and for the performance of the duties, heriots, suits, services, &c. at the times and in the manner limited and appointed in the said lease. And the said lease contains a proviso in these words: "Provided always, that if it shall happen at any time during the said estate hereby granted, that the said yearly rent or sum of 2*l.* and every or any of the duties, services, reservations and payments hereby reserved, or any part thereof, shall be behind, unpaid, or undone, in part or in all, by

the space of fifteen days next over or after any or either of the days or times whereat or whereupon the same ought to be paid, done, or performed as aforesaid, and no sufficient distress or distresses can or may be had and taken upon the said premises, whereby the same and all arrearages thereof, if any be, may be fully raised, levied, and paid, or if the said Charles Smith and Henry Smith, their executors, *administrators or assigns, or undertenants, or any of them, shall suffer and leave the said premises, or any part thereof, to continue in decay or un-repaired, by the space of six calendar months next after such view had, and notice given or left as aforesaid, or shall do or commit, or cause or suffer to be committed or done, any wilful waste, spoil, or destruction in or upon the said premises, or any part thereof, or shall at any time during the said term grind any part of their corn or grain at any other mill than such mill so to be appointed by the said George Lord Vernon, his heirs or assigns, or such person or persons to whom the freehold or inheritance of the premises shall as aforesaid belong (the same being in repair and order to grind such corn and grain,) or if the said Charles Smith and Henry Smith, their executors and administrators, or any or either of them, shall at any time during the estate hereby granted give, grant, bargain, sell, assign, or otherwise depart with this present demise and lease, or with their or either of their estate or interest herein, without the license and consent of the said George Lord Vernon, his heirs or assigns, or of the person or persons to whom the freehold or inheritance of the premises shall as aforesaid belong, in writing, under his or their hands thereunto first had and obtained, or if any default shall be by them, the said Charles Smith and Henry Smith, their executors, administrators or assigns, made in the payment or performance of all or any of the reservations, covenants, and agreements hereinbefore *on their parts contained, that then and from thenceforth, in all or any or either of the said cases, it shall and may be lawful to and for the said George Lord Vernon, his heirs and assigns, and the person and persons to whom the freehold or inheritance of the premises shall as aforesaid belong, into and upon the said premises hereby demised, and into every part and parcel thereof, wholly

SMITH
 v.
 EARL JERSEY

[*302]

[*303]

SMITH
v.
EARL JERSEY

to re-enter, and the same to have, hold, retain, possess, and enjoy, as in his and their former and proper estate, against the said Charles Smith and Henry Smith, their executors, administrators or assigns, these presents, or any thing herein contained to the contrary thereof in anywise notwithstanding."

The said lease does not contain any other than the above-recited power of re-entry for non-payment of the rent reserved. The said Charles Smith and Henry Smith executed and delivered a counterpart of the said lease.

The rents, duties, reservations and payments reserved by the said indenture, and secured by the render, covenants, and power of re-entry therein contained, at the time of making the said indenture, were ancient and accustomed, and then were as great and beneficial as any which at the time of making the deed of 2nd July, 1757, or at any time thereafter, previous to making the said indenture of 5th September, 1803, were or had been reserved, in respect of the said premises demised by the said indenture.

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The premises demised by the said indenture, and *the premises mentioned in the said declaration, are the same.

The usual and accustomed form of leases of the estate, contained in the said settlement of 2nd July, 1757, for lives, or years determinable on lives, as well prior as subsequent to that settlement, was, with a conditional proviso of re-entry, similar to that in the said indenture of 5th September, 1803.

All the rents, duties and services reserved by the said indenture, which accrued in the lifetime of Lord Vernon, have been discharged and performed; and the said Henry Smith has been ready to pay and perform all things that would have accrued to this time, supposing the said indenture to have continued in force and undetermined.

The said Charles Smith died on the 1st January, 1813; the said Henry Smith and John Smith are still living.

The said Louisa Barbara, by virtue of the said powers to her granted, made her will, dated 5th August, 1783, duly attested, signed and published, and thereby devised the said premises, subject to the estate for life of her said husband therein, unto Thomas Earl of Clarendon for life, remainder to William Augustus Henry Villiers, afterwards William Augustus Henry

Villiers Mansel, second son of George Bussey Villiers Earl of Jersey, and his heirs.

SMITH
v.
EARL JERSEY

The said Louisa Barbara died on the 1st January, 1786, without issue, and without altering her said will as to the said devise of the said premises.

The said Earl of Clarendon died on the 1st January, 1787, whereupon the said William Augustus *Henry Villiers was seised in fee of the said remainder, subject to the said life-estate of the said Lord Vernon.

[*305]

By indentures of lease and release, the former bearing date the 4th January, 1812, and the latter the 6th January, 1812, the said William Augustus Henry Villiers, being so seised of the said remainder as aforesaid, conveyed the same to George Earl of Jersey, Edward Ellice, and Alexander Murray, who thereupon were seised of the said last-mentioned remainders.

Lord Vernon afterwards, and before the 11th of July, the day mentioned in the declaration, died, whereupon the said George Earl of Jersey, Edward Ellice, and Alexander Murray, were seised in fee of the said premises.

The special verdict then finds the leases by the said George Earl of Jersey, Edward Ellice, and Alexander Murray, the lessors of the plaintiff, in support of the several demises in the first and second counts of the declaration mentioned, also the entries and ousters as in the declaration mentioned, and concludes in the usual form, referring the matters to the Court.

This special verdict was argued before the judges of the Court of King's Bench, at Serjeants' Inn, at the sittings holden there before Michaelmas Term, 1816, and in the ensuing Term the Court pronounced their judgment for the defendant.†

From this judgment the plaintiffs brought their writ of error into the Exchequer Chamber, where *the case was twice argued, and four of the judges of that Court being of opinion for a reversal, and three for an affirmance of the judgment of the Court of King's Bench, that judgment was reversed accordingly.‡ From that judgment of reversal the original defendant brought a writ of error returnable in Parliament, praying that the judgment of reversal might be reversed.

[*306]

† 5 M. & S. 467.

‡ 1 Brod. & Bing. 97; 3 Moore, 339.

SMITH
v.
EARL JERSEY

For the plaintiff in error :

1st. The intention of the donor of a power is to be collected from the whole of the deed whereby that power is created ; from the plan and design of it as well as the words, and also from the circumstances of the property which is by him subjected to the operations of that power ; and in the construction of the particular instrument executed under such power, the law will expound it with an inclination to preserve rather than to destroy the instrument, "*ut res magis valeat quam pereat*;" "It is the office of a Judge to preserve, not to destroy an estate."†

[*307]

2nd. The only objection raised to the lease under which the plaintiff in error holds is, that the proviso for re-entry therein contained is not such as is required by the leasing power under which it was granted by Lord Vernon, as not being absolute, unconditional, and capable of being enforced instanter upon every default of payment of rent, on the very day on which such default takes place ; but the words *of the power do not require a proviso for re-entry absolute, unconditional, and capable of being enforced instanter, such words being only "so as there be contained, in every such lease a power of re-entry for non-payment of rent." It is undoubtedly a condition precedent to the due execution of the leasing power, that there should be reserved in all leases granted under such power "a power of re-entry for non-payment of rent ;" but in what terms that power of re-entry is to be reserved the settlement is wholly silent, and the argument for the defendant in error is, that from the non-expression of any terms in which that proviso is to be framed, it necessarily results that the comprehensive expression, "a power of re-entry" (which comprehends and includes every proviso of re-entry adapted to the object for which it is required,) must be narrowed to one particular proviso for re-entry, absolute, unconditional, and capable of being enforced instanter upon every default. But the expression "a power of re-entry" is no description of the particular form, though it is of the general object of the condition to be introduced into the lease, and the language of the leasing power is fully satisfied by a proviso for re-entry such as is con-

† See *Cotter v. Merrick*, Hardr. 93, per PARKER, B.

tained in the lease now sought to be set aside by Lord Jersey, which, though not an absolute, unconditional proviso, and capable of being enforced instantaneously upon every default, is nevertheless "a power of re-entry," sufficient for the object for which it was required, such as was in use upon the estate to which the leasing power applies at the time when it was created, and such as the general term used in the leasing power, "so far from either expressly or impliedly disapproving, seems advisedly to sanction, especially when it is recollected that in a subsequent part of the same leasing power, as applicable to the rack-rent estates, the donor of the power omits the general and larger term, "a power of re-entry for non-payment of rent," and specifically chalks out the very power to be introduced into such leases, viz. "a clause of re-entry, in case the rent to be reserved be behind or unpaid by the space of twenty-eight days after the times thereby respectively appointed for payment thereof." Thus, in this latter case, where large rents were to be secured, defining the extent of indulgence to the tenant, and furnishing the very clause to be introduced, as contra-distinguished from the more general and comprehensive expression previously used, viz. "a power of re-entry for non-payment of rent." Can it be successfully contended that this expression conveys a perfect idea to the mind of the nature and form of the power of re-entry required? It points out, indeed, distinctly the wish of those who framed the settlement that there should be some power of re-entry in all leases of this description, but not the precise terms in which such power shall be reserved. Had the power required a covenant on the part of the lessee to build a house upon the premises, it would still have been a question what house, and a lease stipulating for the building a house of given dimensions, and within a prescribed time, must have been judged of by the law as a reasonable or unreasonable compliance with the condition.

3rd. If the language of the leasing power has been *literally attended to in the lease executed under such power, the next consideration will be, whether the spirit also is preserved; or whether there be anything in the plan and design of such leasing power, and the circumstances of the property to be leased, which, by disclosing a different intention in the donor of the power from

SMITH
EARL JERSEY

[*308]

[*309]

SMITH
v.
EARL JERSEY

that which occurs on the mere reading of the words themselves, thereby imposes a different construction upon such words. The leases under the power are of three sorts. First, leases for lives, or determinable on lives, which are renewable on fines, and where the rents reserved are nominal : secondly, leases for years, where a rack-rent is reserved : and thirdly, mining leases, in which no reservation of a power of re-entry is required. The lease in question is of the first sort, and the proviso therefore for re-entry rather introduced with a view of enforcing regular acknowledgment of the tenancy, than of securing a succession of large payments at stated periods. It is not improbable, therefore, with such an object, that some discretion should be left to the person by whom the power was to be executed as to the form of the proviso. If the words of the leasing power allow such discretion, is there any reason on which its exclusion can be founded? Is the security of the nominal rents endangered by it? Are the acknowledgments of a subsisting tenancy less likely to be regular in a case where the property of the tenant, if hazarded by irregularity, is hazarded to so great an extent as that of the loss of a valuable lease for lives held under a nominal rent, than where it consists only of a short term at a rack-rent? On the contrary, considering that two objects *must have been present to the mind of the framer of the leasing power : first, the securing the rents to those who were to benefit by them ; second, the preservation of the estate in good condition when the lease determined : has not the language of the power been designedly varied, when directing the reservation of the right of re-entry in the two sets of leases? In the leases for lives, where a small proportion of the annual value is to be paid in the shape of rent, and where a distress might be resorted to without injury to the estate, a mere reservation of the right of re-entry is required, in such manner and form as should be found discreet and beneficial, and adapted to the object in view ; but in the rack-rent leases a precise and well-defined clause of re-entry is pointed out, because the interest of both tenant for life and remainder-man is materially consulted in the reserved power of re-possessing themselves of land for which the lessee is not able to pay the rack-rent within twenty-eight days from the time of its becoming due, and where a

[*310]

distress taken for such rent, if resorted to, would probably not secure the rent, but certainly injure the cultivation of the estate.

SMITH
v.
EARL JERSEY

4th. If the literal language of the condition be not violated, and there be nothing in the spirit of the leasing power giving a meaning beyond the words used, the principle which has hitherto governed in cases of this kind must govern in this case, which is, that where a special clause of re-entry is prescribed by the power, that clause cannot be departed from, even in trivial circumstances, without defeating the lease made under the power; the donor of the power being in this respect the legislator, and having a *right to impose any condition precedent he pleases, provided it be not inconsistent with law, and which, when once plainly expressed by him, is not subject to any examination of its reasonableness or unreasonableness. But if no special clause be furnished by him, but merely a direction given that certain leases shall contain “a power of re-entry,” then if a clause reserving the right of re-entry be inserted, the will and direction of the legislator is complied with, unless the power be executed in a fraudulent or illusory manner, which neither law nor equity would hold to be any compliance at all. Such is the true result of *Coxe v. Day*,† explained as that case is by the subsequent decision in this case, when in the Court of King’s Bench, of two of the same learned Judges who signed the certificate in *Coxe v. Day*; for in that case the power having prescribed a particular clause, that is, in the event of the rent being behind a specified number of days, those learned Judges held a proviso for re-entry, which added terms not used in the particular clause prescribed by the power to have vitiated the lease. But in this case the settlement only requiring “a power of re-entry for non-payment of rent,” and the lease containing the clause of re-entry in question, they considered the words of the power to have been complied with, such compliance being not only literal, but not impeachable on the ground of any fraud or contrivance, and, on the contrary, fair and reasonable.

[*311]

5th. In considering whether the lease be bad on the ground of any excess in the indulgence given to *the tenant, where the power, as in this case, prescribes no precise clause of re-entry,

[*312]

† 13 East, 118.

SMITH
 EARL JERSEY

it is most material to ascertain what was the indulgence granted in leases of this estate prior and subsequent to the settlement creating this power. No such inquiry, it may be safely conceded, can be admitted where the precise clause is prescribed by the power; but where the power is silent as to the particular nature of the condition, if it follows from thence that some discretion is to be exercised by him who executes the power in framing the condition, the discretion heretofore sanctioned by the donor of the power, who if she had spoken, must have been obeyed, is fit evidence to guide the judgment where she has been silent. It seems difficult to maintain by argument, that where, by the terms of the condition, reference is made to prior leases impliedly, as where "ancient" or "accustomed rents, or rents as beneficial as the ancient rents," are spoken of, such evidence is not admissible to ascertain either the propriety of the new rents as compared with the old rents in amount, or the propriety of the mode in which they are reserved or secured as compared with the ancient mode of reserving or securing them. But it is said, there is no implied reference in the very words directing the reservation of the power of re-entry. If however the words "a power of re-entry for non-payment of rent" embrace every power of re-entry, properly so called, then some assistance is necessary to ascertain what particular power of re-entry should be introduced, and none better can be had than that which the leases prior and subsequent to the settlement furnish, as directing *the will of her whose will alone is to be consulted on the occasion: and though it is clear that her will of to-day cannot be contradicted by her will of yesterday or to-morrow, yet it is equally clear that those who contend that such will must be the sole guide, must be content to find it elsewhere if they cannot find it in the power itself. For however general the power in its terms, it seems not more repugnant to reason to contend that the execution thereof is thereby left absolutely to the tenant for life, since that would destroy the condition altogether, than to contend that the very generality of the words confines its execution to one, and one only form of proviso for re-entry, and that of the narrowest and most limited form. But upon sound reasoning it must be conceded, that in such case the limit to the

[*313]

SMITH
v.
EARL JERSEY

exercise of discretion by the tenant for life must be sought for, either in the arbitrary rules of law, or in such facts as are fit to regulate the decision of the law; and as in the same power, for a different object, viz. the reservation of the rent, the settler has himself impliedly referred to former leases, why may he not be considered also, in this particular, as referring to former leases, and therefore framing the power in general terms? Either that must be the conclusion, or some more unsatisfactory source of evidence must be introduced, or there must be no limit to the discretion of the tenant for life, or the power must be narrowed to something less than its terms by some supposed will of the settler, not evidenced either by his words or his acts. The evidence therefore admitted at the trial was properly admitted, *and the result drawn by the jury a matter of much weight in the consideration of this case.

[*314]

6th. If the terms of the power be such as to leave the terms of the proviso unfettered by positive direction, there seems little reason to quarrel with the extent of the indulgence, in point of time, granted to the lessee; and such has been the concession throughout the argument of this case. Much more fault has been found with the latter qualification of the proviso, by those who have argued for the defendant in error, viz. with that part which restrains the right of re-entry to the case where no sufficient distress or distresses may be had or taken upon the premises. The reasonableness of this qualification, as applied to the particular rents reserved in these leases, and the nature of the property leased, has been already pointed out: in addition however it is to be observed, that the statute law has not only spoken the same language, but it may be doubted whether it has not restricted all lessors from exercising any right of re-entry not guarded by this reasonable qualification. The 4 Geo. II. c. 28, s. 2, provides, that as often as it shall happen "that one half year's rent shall be in arrear," the lessor "shall and may" without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the premises; and in case of judgment against the casual ejector, if it shall be made appear to the Court that half a year's rent was due before the declaration was served, "and that no sufficient distress was to be found on

SMITH
v.
EARL JERSEY
[*315]

the demised premises," and that the lessor had power to re-enter, then he *shall be entitled to judgment and possession. It then proceeds to bar all relief against such judgments, except on payment of such rent and arrears, together with full costs, within six months. The interests of the lessor and the lessee are by this statute equally provided for : the former is relieved from the formalities of the old common-law entry ; the latter is protected against the forfeiture of his interest, in case there be sufficient to satisfy the rent by way of distress upon the premises. The Legislature has thus recognized the reasonableness of a provision preventing forfeiture, where there is a sufficient distress, and so far affords a strong argument in favour of the clause for re-entry contained in the lease now under consideration. But has it not gone farther ? Do not the words speak imperatively that no re-entry shall be enforced where there is such sufficiency of distress ? The language of the 8th & 9th Will. III., respecting the breaches to be assigned upon bonds, is not so strong ; for there the Legislature only says the plaintiff " may " assign as many breaches as he shall think fit upon the bond, giving the defendant the opportunity of paying the money into court after judgment and before execution. But the courts of law have construed this statute as imperative upon the plaintiff to do what he is there told he " may " do ; whereas in the 4 Geo. II. the language is " shall and may : " and as in both statutes the object is the same, viz. to relieve the subject from the necessity of seeking the aid of a court of equity against the technical difficulties of the common law, why should not this equitable provision in *each statute be construed to be a compulsory provision, and especially in the statute of Geo. II. where it is introduced with the words " shall and may ? " If it be a compulsory provision, applicable to all cases of re-entry, and not confined to cases of re-entry under that statute, then the clause in question conforms itself to the law, and no more : if it be applicable only to cases under the statute, then, by analogy thereto, this leasing power is reasonably executed, being qualified in its execution by what the law of the land has deemed reasonable, and being from the terms in which it is penned open to such qualification.

[*316]

For the defendants in error :

SMITH
v.
EARL JERSEY

1st. The leasing power in the marriage settlement of 1757 (a power granted by a person having the absolute dominion of the fee to a purchaser of a life-estate), expressly requires that the leases shall contain "a power of re-entry for non-payment of the rent thereby to be reserved," which makes it necessary, that the right to re-enter should attach immediately on the rent being unpaid; whereas the lease under which the defendant in the ejectment claims, postpones the right of re-entry for fifteen days after the day of payment, thus depriving the reversioner of a part of that benefit which by the condition annexed to the leasing power was intended to be secured to him. If such postponement be allowed for 15 days, why may it not be allowed for 30, 40, 100, or any other number of days so great as to make the power of re-entry nearly or quite unavailing? Where is the line to be *drawn? If it be allowable to deprive the reversioner of any part of that right of re-entry which the creator of the leasing power says he shall have, of what part may he be deprived? Only two lines can be drawn, either the tenant for life is obliged to reserve the whole right of re-entry, or no part of it. And as the latter rule cannot be supported, it follows, that the right of re-entry in the lease should be fully commensurate with that required by the leasing power, and that this lease is void as an execution of that power.

['317]

2nd. The lease in question is liable to the further objection, that the leasing power requires that the lease shall contain "a power of re-entry for non-payment of the rent thereby to be reserved," whereas the lease contains no such power, but only gives the lord a right to re-enter for the absence of distress for rent unpaid. The meaning of the words of the leasing power is perfectly plain and unequivocal; "a power of re-entry," means something enabling a man to re-enter, and "a power of re-entry for the non-payment of the rent" signifies something enabling a man to re-enter on the occasion, or for the cause of non-payment of rent; now the lease in question certainly does not enable the reversioner to re-enter on such occasion, or for such cause; inasmuch as the whole rent for any number of years may be unpaid,

SMITH and yet he may not be enabled to re-enter. In the case of *Coxe v.*
 EARL JERSEY *Day*,† this point was expressly decided.

[*318]

3rd. It is said, in support of the lease, that the *creator of the power has used very general language, that a power is required, without saying what power; and that the power of re-entry in this lease is sufficient, because it is a reasonable power, and was usual on the estate. It is true, the language of the leasing power is general, so general, that only one quality is specified, which the power of re-entry is required to have, that it should be for non-payment of rent; but the creator of the power having exacted this one condition only, is certainly no reason why a compliance with that condition should be dispensed with. The leasing power requires that the power of re-entry should be for non-payment of rent, and it does not require that it should be usual or reasonable; why then should the leasing power be so construed as to dispense with the former condition, which by its terms is annexed to its execution, and to exact a compliance with the latter which is not so annexed. Besides, it is not found that this conditional clause of re-entry is reasonable, or that it is usual generally; it is only found to be usual on the estate, which is not only not the same thing as usual generally or reasonable, but may be the direct contrary. The generality of the word *a*, (relied on in support of the lease) must certainly exclude a reference to any particular class of clauses of re-entry, such as those on this estate, as nothing can be more opposite to a general word than a word of reference. If this leasing power be construed to require the power of re-entry usual in cases of the lands comprehended in the settlement, although in this particular case this construction will operate to the advantage of the lessee, yet

[*319]

*it may in other cases be productive of the greatest inconvenience to him. Suppose a lease under a power, in the terms of this leasing power, to be on the face of it conformable to the power, yet if this construction prevail, the reversioner will have a right to avoid the lease, if he can shew that the clause of re-entry is different from that which is usual on the estate comprehended in the leasing power. The inconvenience to both parties will be extreme, if a lessee cannot be sure that he has a valid lease, by

comparing his lease with the power, without inspecting all the leases formerly granted of lands within the same estate. It is submitted, that what the creator of a power has required, must be done for this one reason, of itself sufficient, that it is required, and that it is a much safer rule to adhere to that condition which is expressly annexed to the execution of a power by one who has all the circumstances of the property before him, and who has the right to enlarge or narrow the power to any degree, than to substitute for what he has exacted something which it may be conjectured he ought to have exacted, but has not.

SMITH
v.
EARL JERSEY

4th. The power of re-entry in the lease is not only different from that required by the leasing power, but much less beneficial to the reversioner. Under an absolute power of re-entry, the reversioner would be entitled to succeed in an ejectment, on proving the rent in arrear, a demand made, and the execution of the counterpart of the lease by the defendant. Under a power to re-enter on failure of distress, it would be necessary for him to prove that he had searched every part of the premises demised, *and that no distress was to be found,† a matter of extreme difficulty where the rent is small and the premises extensive. A conditional clause of re-entry, which may be an adequate remedy in the case of high rents and lands of small extent, becomes quite insufficient when the rent is small, as is usually the case with ancient rents, and the lands demised of considerable extent. And as the absolute power of re-entry becomes the more necessary for the lord, in case of small rents for large property, so it becomes the less inconvenient for the tenant, who might have some difficulty, and expect some indulgence to raise a large sum, but can have none in being ready with a small one. It is indeed universally true, that in order to secure a small demand, the remedy should be more summary and less expensive than is requisite to enforce a large one. [*320]

5th. The finding of the jury, that the usual and accustomed form of leases of the estate contained in the marriage settlement was with a conditional proviso of re-entry, ought not to be taken into consideration in deciding this case. The words of the leasing power are “a power of re-entry for non-payment of the

† *Rees v. King, Forrest, Ex. 19.*

SMITH
v.
EARL JERSEY

[*321]

rent thereby to be reserved ;” they contain no reference to the former practice of leasing the estate, nor is there any fact stated on the special verdict which raises any ambiguity in them ; and a provision contained in a written instrument may not be explained or construed by any extrinsic matter, except in two cases ; first, when the provision refers to extrinsic matter ; secondly, when its terms contain a latent ambiguity, that is, *when, in consequence of some matter of fact shewn by evidence, it appears that the language of the instrument has more meanings than one, neither of which is the case with the clause in question.

6th. Even supposing the former practice on the estate might legally be taken into consideration, it is far from affording any inference favourable to the lease in question. It is not found that the former leases were granted under similar powers. There is nothing to shew that the creator of the power was not dissatisfied with the former clauses of re-entry, and did not insert the provision in question for the very purpose of introducing a new one, which might well be, for the reasons stated above. And this is the more probable, because the leasing power, in several instances, expressly refers to the former practice on the estate, where it was intended that the tenant for life should be guided by it ; there is no such reference in the clause relating to powers of re-entry ; the inference is, that the practice was not intended to prevail with respect to powers of re-entry.

The *Attorney-General* and *Mr. Puller*, for the plaintiffs in error.

Mr. Jervis and *Mr. Maule*, for the defendants in error.

[*322]

In the course of the argument the LORD CHANCELLOR observed, that if the settlement had said there should be “ a reasonable power of re-entry,” somebody *must have judged, in the first instance, what was reasonable in that respect ; and he added, that in his experience he had never seen a settlement which directed any thing as to the number of days allowed for rent to be left in arrear : and that as to leases granted under powers in

such settlements he had never seen any which did not contain some allowance of days.

SMITH
v.
EARL JERSEY

After the argument, the LORD CHANCELLOR proposed the following question for the opinion of the Judges :

Whether, having due regard to the true intent and meaning of the indenture of the 2nd July, 1757, according to the legal construction of the several parts of that indenture as stated in the special verdict, and having also due regard to the legal effect of all the facts and circumstances found by the special verdict, the demise of the 5th September, 1803, as the same is stated in the special verdict, is for any and what reasons invalid ?

There being a difference of opinion the Judges, in answering this question, delivered their opinions *seriatim*.

[The following held the power well executed and the lease valid: RICHARDSON, J., BURROUGH, J., HOLROYD, J. and DALLAS, Ch. J. The following held the lease invalid: BEST, J.,† GARROW, B., BAYLEY, J., WOOD, B., GRAHAM, B., RICHARDS, C. B. and ABBOTT, Ch. J.]

† In the course of his opinion, BEST, J. referred to a case reported in Lofft, 316, under the name of *Holley v. Scott*. A note of that case, copied from a manuscript note taken by Mr. Butler, is subjoined to the report in 3 Bligh (at p. 331). The note gives the case under the name of

LORD TANKERVILLE v. WINGFIELD
AND PRITCHARD.

[Michaelmas Term, 14 Geo. III.
B. R.]

Upon ejectment; the case was as follows: Upon the marriage of Sir John Astley, his lady's estate was settled upon Sir John for life, with several remainders over, which never took effect; remainder to the lady's right heirs. A power of leasing was given to Sir John, such leases to be made for any number of *years, at the accustomed rent, to take effect

immediately in possession, and not by way of future or reversionary interest; and on every such lease there was to be inserted a clause of re-entry if the rent should be behind for twenty-one days; the rent to be made payable, and the re-entry to be incident to and go along with the reversion or remainder. In the same settlement there was also a power of revoking all the uses thereby declared, and appointing new.

Some time after the marriage, Sir John Astley and his lady revoked all the uses of the settlement that were subsequent to Sir John's life-estate, and the powers incident thereto, and declared new uses. There was also a fine levied to the same effect.

September 21, 1768, Sir John made two several leases of this date to the two defendants, Wingfield and Pritchard, for twenty-one years, con-

SMITH
v.
EARL JERSEY

THE LORD CHANCELLOR :

[442]

The question which is now brought before your Lordships for decision is undoubtedly a question of very great importance to

formable to the power he had by the said settlement, and the other deeds and the fine, except that previous to the entry distress was to be made, and it was nearly in the following words: "That if the rent should be behind or unpaid by the space of twenty-one days, and no sufficient distress or distresses could be had, or if the lessee should assign over the leased premises, (except as therein is excepted) then it should be lawful to Sir John Astley, his heirs and assigns, to enter."

[*333, n.]

Sir John Astley and his lady being both deceased, the estates are descended upon Lord Tankerville, the plaintiff, &c.

Dunning, for the plaintiff :

The Court always takes a difference between powers when exercised by a man upon his own estate, and the exercise of powers by a man upon another's estate, or which he holds in another's right. The first are always construed favourably to the persons making use of this power ; the second are taken in a strict light : here it was certainly the second. It was a power to be exercised on the wife's estates, and, in some respect, in prejudice of his wife ; and therefore to be taken strictly.

1st objection, That the settlement declares that the power of re-entry should be reserved and made incident to the inheritance of the estate ; and by the lease it is reserved to Sir John Astley, his heirs and assigns. 2nd objection, The settlement directs the re-entry so to be reserved as above, to be made immediately, if the rent should be behind by twenty-

one days. By the lease it is to be preceded by demand and distress.

These are strong, plain, and conclusive objections.

Bearcroft, for the defendants :

The remainder-man, Lord *Tankerville, has, substantially, all the powers he ought to have, or can have. As to the first objection, the rent cannot be made payable but to those in remainder or reversion, to which it is inseparably incident. The heirs and assigns of Sir John Astley mean those who are heirs and assigns to the estate under the settlement by which Sir John claims the estate. See *Cother v. Merrick*.† Tenant in tail died seised, his son entered, and made a lease for twenty-one years, rendering rent during the term to the lessor, his heirs and assigns, and died.

It was unanimously adjudged to be a good lease, and within the 32 Hen. VIII. ; the opinion of the Court being, that the word heirs being a comprehensive word, it ought to be construed *secundum subjectum materiem*, and to have that construction which the nature of the deed requires. This is much the stronger in the present case, as Sir John Astley having joined with his wife in the deeds which raised the limitations, those who take by virtue of those limitations may, in some respect, be said to be the heirs and assigns of Sir John Astley. As to the second objection, that the re-entry, which is directed by the power in the settlement to be reserved immediately on the rent being behind twenty-one days after it is due, is by the lease

† Hard. 89.

the parties. We have to determine upon the validity of a particular lease, which is stated in the special verdict. The SMITH
EARL JERSEY

to be preceded by distress and by demand. The words in the settlement are short and loose, and seem to be no more than a general direction that in every lease to be made under this power there should be a clause of re-entry. It is not a formal description what kind of re-entry should be reserved, or of any particular clause of re-entry; it is a direction that the power of re-entry, usually inserted in leases, should be inserted in the leases to be made under this power in the usual manner. This, I apprehend, is a sufficient answer to the objections raised against these leases; each is a verbal objection, and I have given each a verbal answer.

Mr. Dunning, in reply:

The distinction I set out with, and the consequence of that distinction, that these leases are to be considered in a strict light, is not denied. And besides this claim to the favour of the Court, Lord Tankerville has that of being the heir at law of the owner of the estate on which this power has been exercised. Lord Tankerville is neither the heir nor the assignee of Sir John Astley; he claims by a title paramount to Sir John's. The rent is directed by the settlement to be incident to the inheritance, that is to say, to be to the several *limites of the settlement when respectively in possession. The reservation is to the heirs and assigns of Sir John Astley. They are not limites. This is therefore not a proper execution of the power. The case quoted, and the Act of Parliament † only shew that if a tenant in tail make a lease according to the statute, and reserves

rent to himself and his heirs, the words "heirs and assigns" may be construed to be such heirs as may succeed by force of the entail. This construction can never in the present case take in Lord Tankerville, who cannot, in any sense or meaning whatever, be deemed the heir of Sir John Astley or his assign. It is sufficient to say, that in pleading he could never be described as such. As to the words being loose, and directing what should be done, and not describing how it is to be done, this seems a frivolous distinction. The settlement directs a clause of re-entry to be inserted in the lease; the lease says it shall not be lawful for Sir John Astley to enter as long as there is a sufficient distress or distresses to be taken. Till then it is postponed. This is contrary to the words of the settlement, and is not, certainly, a proper execution of the power.

LORD MANSFIELD:

The two objections to these leases are, 1st, That by the settlement the re-entry is to be made incident to the rent; but by the lease it is reserved to Sir John Astley, his heirs and assigns. And in the event it has not followed the rent, but gone to the heirs of the lessor, Sir John Astley, while Lord Tankerville is in the lawful possession and receipt of the rents. The second objection is that the clause of re-entry, which by the settlement ought to be immediate, is by the lease fettered, being on a previous demand ‡ and previous distress. As to the first, by the nature of the power it must go with the reversion and inheritance. The person who is in the reversion and

[*334, n.]

† 32 Hen. VIII.

‡ This does not appear by the clause as set forth on the last page.

SMITH
 EARL JERSEY

decision upon that lease however will not only give validity or invalidity with respect to the lease in question, but, as we have been informed upon the argument at the Bar, will give validity or invalidity to the leases of a very considerable property. The plaintiff therefore has a great interest in your decision. The tenants of course have a very considerable interest in your decision; but the interest in your decision is not confined to the landlord and the tenants in this case, because I apprehend that if these leases are invalid, the tenants in this case, probably, as in a case from another part of the United Kingdom, I mean the case of the *Queensberry leases*,† will have a title to recover against the assets of the deceased lessor the value of the interest in the lease, if the decision should be against the validity; but however great the interest of any of these parties may be, it is most for the

[*443] *public interest that you should take care to decide rightly.

If I could foresee that by asking for further time I might alter that opinion which it is my duty to inform you I have long entertained upon the question now before you, or if I could, consistently with my other important engagements and duties, hope to find time to lay down the statements which I am now about to make with more method, I should certainly wish your Lordships to delay hearing what I have to say on this subject. If

[*335, n.]

inheritance is he that is to enter on the forfeiture of the lease, and no one can enter but he to whom the rent is payable; for as Littleton says, no stranger can enter for forfeiture, for a stranger cannot be in by his former estate. If the rent had been reserved for the term, as in the case cited from Hardres, still it goes with the inheritance. Heirs and assigns can only mean those who have the reversion and inheritance; otherwise, as is said, 2 Saund.‡ they would be words of surplusage. The clause of re-entry must go with the inheritance the same as the rent, for it cannot be reserved to any body but to him who is seized of the in-

heritance. It was said, that it ought to have been worded, to the person next *in the reversion or remainder. The words heirs and assigns are general words, and are as good as and quite tantamount to particular words. As to the second, the clause of re-entry is short with words of course, and does not preclude the operation of law. A re-entry is to enforce the payment of rent; it is an immediate forfeiture of the estate by common law. By statute it cannot be without a want of distress. Therefore in both points we agree to support the leases.

So the verdict must be entered for the defendants.

† 20 R. R. 61 (1 Bligh, 339).

‡ 370.

I could hope to relieve myself from the pain which I do most sincerely feel in maintaining an opinion upon this subject different from that which has been expressed by persons for whose learning and abilities I entertain the greatest respect, I should for that reason also endeavour to press your Lordships to delay hearing what I have to offer.

SMITH
r.
EARL JERSEY

I must confess, that, from the habits of my professional life, I felt at first considerable surprise indeed how it could be that upon some of the questions agitated in this House there could be any difference of opinion anywhere. With respect to the authorities, you have heard observations which are perhaps much more apt than any I could presume to offer to your attention upon the conflicting cases of *Hotley v. Scot* † and *Coxe v. Day*, and the negative authority of the case before Willes, Ch. J., who I believe was a very great lawyer. Those authorities, I hope I shall not be thought to treat with any disrespect, which certainly I do not mean, when I avail myself of what has fallen from the two learned Chief Justices in their observations on **Coxe v. Day*. If *Coxe v. Day* is an authority one way, *Hotley v. Scot* is an authority the other way; and the judgment of two of the Judges in the Court below on this very case conflicts with the case of *Coxe v. Day*. But such have been the habits of my professional life that I cannot think that we have attended to all the authority which deserves consideration. That the practice of conveyancers amounts to a very considerable authority on this subject I am justified in saying, by the opinions of the greatest lawyers in Westminster Hall, who I am persuaded, in many instances, would have come to a different decision from that which they thought proper to adopt, if they had not taken notice of the practice of conveyancers. But upon this subject I take the liberty, with very great respect, to intimate an opinion, that upon cases of this nature, it might not be much amiss if courts of law would inquire a little more what has been done in courts of equity, for the purpose of knowing how far Judges who have sat in courts of equity have determined the legal point before they have applied themselves to those directions, and decrees, and orders which they are daily in the habit of pronouncing.

[*444]

† This case is reported in Lofft, 316, under the name of *Hotley v. Scott*.

SMITH
EARL JERSEY

Between the year 1772 and a period approaching the year 1780, I spent many of the most profitable years of my life in the office of a conveyancer, and I was led at that time to a knowledge not only of the practice, but of what were the sentiments of the great conveyancers of those days; and I am sure it never would have occurred to any one of them, if there was a leasing power in any marriage settlement requiring such a power as this, *that to give the time of fifteen or twenty days was making the execution of the power invalid. I am sure all practice was the other way, and practice in this respect is evidence of what is reasonable.

[*445]

But it does not rest there, because you have to consider the question as applied to marriage-settlements which are framed in different ways. You have marriage-settlements where an estate for life is granted to A. with remainder to the wife for her life, with an interposition of trustees to preserve contingent remainders before the limitations to the issue. In some settlements there is a power to the tenant for life to make leases, which is given not only for the benefit of the tenant for life, but it is a power which you are permitted to insert in the settlement for the purpose of the due cultivation and management of that estate which they are first to enjoy, and others after them; but that power of leasing in a well-framed settlement is not merely given to the tenants for life, but frequently to the trustees, while there are infants who do not as yet take an interest entitled to the benefit of it, but who are not capable of managing the estate. Suppose the father and the mother to die, and then there being trustees to preserve contingent remainders it becomes necessary to make leases. Or suppose that a settlement is made, in which the legal estate of inheritance, the legal fee, is entirely vested in the trustees; where therefore a legal lease cannot be made by the equitable tenant for life, nor the remainder-man, nor the issue, but during the infancy, it may be made by the trustees. In both those cases it frequently happens that the trustees in the one case to preserve contingent remainders, in the other

[*446]

*case the trustees of the inheritance are called on to make leases, and in most of those settlements there is no mention of the period of forbearance which shall be given; some do, but there is an infinite majority which do not mention any days at all. I

venture to say this as matter of my own knowledge. The practice as to leases made by such trustees would, I say, of itself form a weighty consideration here; but in leases of that kind, made under such powers by the authority of the Court of Chancery, you must permit me, for my predecessors and successors, though not for myself, to say, in every one of those cases there is an authority of law that that is a due execution of the power, because the Chancellor has no right to direct such a lease to be made, if when it is executed it is not according to the power; he is a judge of law and equity, and when he has determined as a judge of law that such is a due execution of the power, then and then only has he authority, according to the constitution of this country, to direct any such trustees to make such leases. I should be glad then to know whether the constant practice of that Court is not to be looked at as a practice fixing what is the legal construction of such a power to lease.

SMITH
v.
EARL JERSEY

It does not rest there; for in the case put by one learned Judge, suppose the tenant for life here had agreed with this occupying tenant to make him a lease, with a power of re-entry giving such an extension of time, and then the tenant had filed a bill in equity to compel him to make a lease according to the agreement. No Chancellor could possibly have directed a lease to be made with fifteen days time in case of a nonpayment of rent, unless he was satisfied *according to law that would be a due execution of the power; he could not have done it in the numerous cases in which there have been such decrees made. I disclaim, for those who have gone before me, and those who are to come after me, the charge that it was not done upon the authority of cases which have at least as much, if not a great deal more, authority than those which have been stated.

[*447]

Suppose the case where commons are divided under the General Inclosure Act.† There are certain persons having a portion of those commons, who though perhaps seised of a large property yet only have an enjoyment for lives, I mean parsons and vicars. A parson or vicar under the Inclosure Act is authorized to make leases in which there must be a power of re-entry within a reasonable time. We have acted under that

† 41 Geo. III. c. 109, s. 38.

SMITH
EARL JERSEY

General Inclosure Act ever since it passed. Parsons and vicars have been making leases ever since; and I believe you will find that the universal practice has been to give days in the manner days are given in this lease. It is truly said, that is within reasonable time which is authorized. But I should be very glad to know what difficulty there can be in courts of justice deciding what forms reasonable time, when the Legislature has expressly said all these leases shall be made with allowance of a reasonable time. In the very parish in which parson and vicar have this sort of power there may be fifty tenants for life for successive estates in land. In such a case the course of proceeding is, that the allotments are to be enjoyed *according to the limitations of the settlement of that land in respect of which they are made. What is the consequence? The consequence is, that the power of leasing in the settlements under which those respective persons (lay persons, not ecclesiastical persons) are made tenants for life, apply themselves to the whole of the lands after the allotment is made; and a most singular thing it would be to say that fourteen or fifteen days is a reasonable time for a power of re-entry for a parson or vicar, but a direct breach of all that is reasonable with respect to the tenant for life claiming under a settlement, which settlement has a new object to operate upon in the allotment made under that very Act of Inclosure. I say therefore, as to this case, that if it does not stand on peculiarities in this settlement, there is a weighty authority to be found in practice of long endurance, which I will venture to say would make your decision one of the most mischievous that ever was pronounced in this House, if you were to decide against such practice.

But I think we may lay out of the question the authority of practice. I proceed to comment upon the terms of this settlement, taking it for granted that it is understood on all sides that this special verdict completely finds every thing that ought to be found. I put that upon the understanding of the parties. We have had in the course of argument at the Bar a great deal of discussion upon the admissibility of extrinsic evidence. Now, with reference to extrinsic evidence, my humble opinion is, that this is a case in which you must admit some extrinsic evidence;

*448]

you ought not to admit *any extrinsic evidence which falls within the range of the principle, which says that you must construe instruments by what is to be found within the four corners of them, generally speaking; but it is impossible, in my judgment, in this case, for the reasons I have stated, that you can come to a conclusion without looking at a great deal more than the lease itself; because, when you are considering the question whether the lease is conformable to a power in another instrument, you must look into that instrument which contains the power, and if you must look into that instrument which contains the power, then, in order to get at the true construction of the power itself, you must look at every part of that instrument; and if the instrument which contains the power be referred to by the instrument which is the execution of the power; if the instrument which contains the power also refers you to other instruments, which you must look at, as appears upon the face of the instrument which contains the power, for the construction of the power, you must then look at other instruments to see the meaning of the power.

SMITH
v.
EARL JERSEY
[*449]

I think in this case you might state it thus: Here were leases made prior to 1757; the settlement refers to existing leases at the time when the new instrument is made, it refers in that part of it which gives the power of making future leases to the existing leases. I do not carry it so far as to say you shall go back to a great length of time to see what were the habits of leasing prior to those existing leases, but I say you must go to those existing leases, or it is impossible to collect *what the meaning of that power is. I say also, that if the instrument in which the power is contained shews what was the nature of the estates that the persons had who were making that settlement in which the power of leasing is contained, you cannot shut your eyes against that part of the instrument which shews what was the nature of the estates.

[*450]

With these general observations I call your attention to what this case is. A lady named Louisa Barbara Mansel, afterwards Louisa Barbara Vernon, was tenant for life of the estates, with several remainders over. The will under which she claimed as tenant contained a power to her in consideration of marriage,

SMITH either before or after marriage, of revocation and appointment,
 EARL JERSEY as afterwards pursued by her in the deed of settlement. The
 special verdict states, that upon the 20th of July, 1757, she
 intermarried with Mr. Vernon; that before the marriage, upon
 the 2nd of July, 1757, she by her deed revoked the uses and
 devises contained in the said will concerning the said premises,
 and appointed and limited the same to Francis Earl of Guildford
 and Charles Montague, and their heirs, in trust, to hold the
 same to the same uses as before limited, until after the said
 marriage, and then to the uses of the said George Venables
 Vernon for life, without impeachment of waste, remainder to the
 said Louisa Barbara for life, without impeachment of waste, and
 in the mean time to the said Francis Earl of Guildford, and
 Charles Montague, and their heirs, to preserve contingent
 remainders, and to permit the said George, during his life, and
 afterwards the said Louisa Barbara, during her life, to *take the
 rents, &c. and after the decease of the survivor of them, to
 divers other uses for the benefit of their issue, and in default of
 issue to the use of the will of the said Louisa Barbara, and sub-
 ject to the powers and limitations to be thereby directed and
 appointed, and in the mean time to the use of the said
 Louisa Barbara, her heirs and assigns for ever. And then
 follows the clause upon which this question principally arises.

[*451]

Before I state that clause I will mention another head of
 authority, which I confess has disturbed me a good deal with
 respect to these fifteen days. By a statute† made some years
 ago the Legislature empowered the committees of lunatics, by
 authority of the Court of Chancery, where those lunatics were
 tenants for life, with powers of leasing, to make such leases as
 the tenants would have made if they had been of sane mind;
 and I never had the least doubt, in consequence of the habits of
 my professional life, in directing them to make leases with this
 ordinary reservation of fourteen or fifteen days, with respect to
 the time of forfeiting the estate. I certainly did, however, think
 it right, in deference to the opinions which I understood had been
 stated in the Exchequer Chamber, to check myself in that prac-

† 43 Geo. III. c. 75, ss. 3 and 4. IV. c. 65, s. 1. See now 40 & 41
 [Repealed 18 Geo. IV. and 1 Will. Vict. c. 11, s. 49.]

tice, and to take care that that habit should no longer be acted on. So, if a parson or vicar should be a lunatic, who had an allotment under an Inclosure Act, and it should become necessary for the Court to act, I should have directed the execution of the power in a similar manner.

SMITH
C.
EARL JERSEY

Where a power of this sort is given in a marriage-settlement *it is part of the contract which all the parties in the marriage-settlement are understood to enter into with respect to each other ; it is for that reason to be construed in questions between the parties to the settlement and those taking under it according to the intention of the parties. In a question, between a landlord for the time being and a tenant, I apprehend the landlord for the time being is to be considered, in an instrument of this kind, as acting on the behalf of all the parties who have interest in the inheritance of the estate ; and that therefore there must be that *bona fides* on his part with respect to the tenants which would be required in other cases, and upon a question of forfeiture, if the parties really are dealing *bonâ fide* according to what they conceive to be the intention of the parties, (not misconceiving that intention, which would vitiate the lease ;) but if a fair construction will authorize you to say they have not misconceived it, you are not to look astutely to defeat it.

[*452]

In this case there were three species of estates of which leases were to be made ; one of these estates, as I understand, usually demised for lives upon payment of a fine, which payment of a fine is in truth a great portion of the consideration which is paid for such leases ; and the small annual rents and other services, though of some value positively speaking, are of little value compared with that other part of the consideration ; they are a sort of rental, which is rather from time to time calculating a small sum of money off the value, than paying any part of the value of the estate. The next species of lands are lands to *be let at rack-rent for years absolute, and with reference to them it is very easy to reserve a power of re-entry : and the third is of mines ; with regard to which, unless conveyancers are more able at this time of day than some of the old ones used to be in the last century, it would be difficult to find out what sort of power of re-entry you could apply to it ; they are therefore in general obliged to

[*453]

SMITH content themselves with alluding to proper and reasonable modes
 of working the mines.
 EARL JERSEY

The condition to which we are particularly to attend is this ;
 “and so as there be contained in every such respective lease,
 demise, or grant ; and so as on every such respective lease,
 demise, or grant for a life or lives, or for years determinable on
 the dropping of a life or lives, there be reserved and made pay-
 able, during the continuance of the estates and interests thereby
 to be demised, leased or granted respectively, the ancient and
 accustomed yearly rents, duties, and services, or more, or as great
 or beneficial rents, duties, and services, or more, as now are, or
 at the time of demising or granting the premises so to be demised,
 leased, or granted respectively, were reserved or made payable
 for or in respect of the same premises respectively, or a just
 proportion of such ancient or the present reserved rents, duties,
 and services, or more, according to the value of the premises so
 to be demised, leased, or granted respectively ;” and then come
 the exceptions with respect to the heriots, and the usual clause,
 that these were to be for the benefit of the persons entitled from
 time to time. *Now, let us suppose ourselves sitting down to
 make a new lease of these premises after the year 1757, of pre-
 mises which in the year 1757 were held under a then existing
 lease, addressing ourselves to the execution of that power. Is it
 possible to deny, that in order to see how the power is to be
 executed you must look at that existing lease which is the lease
 immediately preceding that which you are to execute ? I do not
 carry it farther ; I do not enter into the question whether you
 are to go back into the more remote periods of time and see what
 was the habit in all times past ; but I say you are bound to
 receive the evidence to which the language of the power refers
 you ; and you are bound to receive the evidence of the deed
 containing the power. If you mean to demise the lands accord-
 ing to the ancient and accustomed rent you must go to former
 leases to know what it is ; so as to the duties and services. It is
 not necessary they should be the same yearly rents, duties, and
 services, or more, but they may be as great or beneficial rents.
 I have no difficulty in saying, that under this clause you might
 reserve as *great* a rent, or as *beneficial* rents. I have a right to

[*454]

look at this word “or” as being of some signification. I find in other parts of the lease as great *and* beneficial. This is to be as great *or* beneficial; and I cannot help expressing the opinion, that I entertain a very considerable doubt whether, if this clause as to the distress had not been contained in the new lease, the new lease for that reason would not have been bad.

SMITH
EARL JERSEY

If it be argued, that demising for a rent of 2*l*. *and instead of reserving a power of re-entry for the non-payment of the rent, in the sense which has been put on the words, reserving a power of re-entry on non-payment of the rent for fifteen days, that you thereby affect, though in a small degree (and I agree entirely with what the LORD CHIEF JUSTICE says, that it is not the degree, if you affect) the principle on which you ought to act; I answer if this power authorizes me to make a lease, provided the rent is as beneficial, if I demise upon the same rent, in the same way, do not I reserve as beneficial a rent as formerly? The stress laid on these words would go a great way to convince those who consider what the case would have been if there had been no such words; the former leases having that power of re-entry for non-payment of rent, would not this power have been the same in construction whether those words formed part of the instrument or not, because without that power of re-entry the rent would not be so beneficial as under the former leases?

[*455]

Then come these words, and let us suppose that they are necessary; “and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved;” and this occurs in an instrument, where with respect to property upon which the best and most improved yearly rent was to be reserved, and where, with respect to that rent which was to be so reserved a rent which was *de anno in annum*, and from half year to half year, rendering to the landlord the value of the enjoyment for those periods by the *tenant, the authors of this settlement say that in such a case as that there shall be non-payment allowed for twenty-eight days.

[*456]

I take it now upon the first objection as to the fifteen days; and I should be very glad to ask whether a power of re-entry for non-payment of rent in fifteen days is not a power of re-entry for non-payment of rent? No man can deny to me that it is a

SMITH
v.
EARL JERSEY power of re-entry; no man can deny that it is a power of re-entry for non-payment of rent. It is not the same power as it would be if it was twenty days, or twenty-five days, but still it is a power of re-entry for non-payment of rent; and where are the words on which the parties insist there shall be an unconditional power of re-entry for non-payment of rent? They have said no such thing.

[*457]

Now, to recur again to the impression that old habits make on one's mind, it would have appeared to me, previous to the agitation of this case, one of the most astonishing things, having had a good deal to do with decisions at law, that where powers are so generally expressed as to leave it in the party to say this is a power of re-entry for non-payment of rent, that these words generally expressed, considering the practice, are to be an actual execution of the power: it would be most astonishing to me, that if there was a lease to be made, the lessor could insist it should be no lease, but a lease giving a power of re-entry at the day. I should say that was contrary to the habit and usage of a court of equity. Speaking from that *habit and usage, the language of the law, before it made any order or decree, the Court ought to decree in favour of the tenant if he were willing to execute a lease upon a reasonable period of days for the non-payment of the rent; and I cannot help thinking that from the circumstance of pointing out the twenty-eight days in the other case, you are bound to see a difference between the reservation of a rent which is the actual value from year to year, of the land that is occupied, (as far as a tenant ever pays the actual value;) and where a tenant pays a great fine. It does appear to me that this deed affords sufficient evidence, particularly with reference to the words I have before commented on, that if the rent was as beneficially reserved as in the existing lease, that it is a due execution of the power unquestionably.

But that does not touch the question about distress, I admit, save as it touches the question if the same qualification of distress was in the former lease: because if the same qualification of distress was in the former lease, then the same arguments that you build on giving the period in the former lease applies to giving the distress; but if this means a reasonable power of

re-entry, and if that has been the construction usually put on it, it is the same as if the lease was directly conformable to the power. The practice has applied that quality to the reservation of a power; and I know no difference between determining what is reasonable with reference to that object, and what is reasonable as applied to the other objects: when you speak of a reasonable *rent, that means the *quantum* of rent; but a reasonable power admits of different considerations.

SMITH
v.
EARL JERSEY

[*458]

I might stop there, because though I cannot agree with the learned Judge, who thinks that the statute of 4 Geo. II. is imperative, yet it is impossible for me to deny that the statute of 4 Geo. II. and the General Inclosure Act, and all the practice to which I have been alluding, does establish, beyond all question, that it is a reasonable execution of a power even where this clause of distress is put in; and when we are considering these circumstances let us attend to the extreme importance of the question before us in one respect. You are not merely in the execution of a power to consider what is most beneficial as between A. the tenant for life, and B. the remainder-man, but what is most beneficial to both, and to each with reference to the terms on which tenants are to be procured; and though in this case there is very little difference, perhaps, of convenience or inconvenience to the tenant, whether he is to pay on the day it is reserved, or fifteen days afterwards, yet on the one hand, if there be that little inconvenience, I say that is a ground why if the words of the power contained in the settlement will allow you to give those days, you shall not say that it is a forfeiture of the lease; and on the other hand I say, though the *quantum* of convenience be ever so small, yet that the principle in deciding these cases requires you to consider, not merely what is for the benefit of a person having an interest in one parcel of the *inheritance, but what is for the benefit of the whole inheritance, and all the persons to take in it.

[*459]

There is another way of putting it, which is material, if I am not wrong in my notions of the practice: if powers are to be executed for the benefit of all persons having an interest in the inheritance, what will be the situation of persons who have those powers is a most serious consideration; and I cannot agree with

SMITH
v.
EARL JERSEY

those who profess to have paid less attention to the state of titles than they ought, because, unless I mistake, nothing requires more attention ; so as to what practice has introduced, and what would be the inconvenience of shaking that practice ; and you are to consider, too, that unless you are to adopt the principle, that in a settlement where a power is given as nakedly in the terms of it as here, you are to execute that power in the precise terms ; that no tenant for life, no trustee, nobody, in short, who has not an absolute inheritance in the estate, will ever think of executing a power without the direction of the Court to tell him whether it is right or wrong ; the inconvenience of which would be infinitely great. But I am of opinion that these words are words of course ; in the language of Mr. Justice BAYLEY, (and the diversity of powers is acknowledged in Brook ;) that this is an entry for non-payment of rent ; that the words of the settlement do not condemn such a power for re-entry for the non-payment of rent as is here reserved ; and I think the qualifications in this power have had the authority of the Legislature for saying that they are reasonable ; and therefore on these grounds I shall offer my opinion that these leases are valid. *Whether your Lordships may think proper to adopt that opinion it is not for me to say ; it is my duty to express that opinion.

[*460]

LORD REDESDALE :

Having attended throughout the discussion of this question, and having from a very early period of life had much converse with that part of the law which enables me more particularly to consider cases of this description, I mean conveyancing, I think it my duty to offer a few words to your consideration.

With respect to what has been said as to general opinions upon the subject, and the practice of conveyancers, I cannot agree with much that has been said, because I do conceive that the law has frequently been decided, even in the construction of Acts of Parliament, upon what has been the general understanding of lawyers as to the true construction of these Acts of Parliament ; and I will instance such a case under the Statute of

Jointure. This House determined in the case of *Drury v. Drury*† that a rent-charge settled on an infant was within the Statute of Jointure a good bar of dower, not because such was the literal interpretation of the statute, but because such had been the constant practice of conveyancers and others touching the subject, and it was expressly upon that ground that the decision at that time went; and I do conceive that it is of the utmost importance that the House should use its judgment by such a criterion whenever the case occurs, for otherwise all property must be in *hazard. It is more especially so with regard to settlements which are ordinarily prepared by those persons who employ their minds in the construction of deeds, and what persons of that description consider to be the law thus acted upon for a length of time, and not disputed in courts of law, should be taken to be the general impression upon the minds of lawyers upon the particular subject, and more particularly it must have reference to that construction which ought to be put upon settlements prepared by persons of that description. How are you to understand the intent of parties in a settlement which really and truly is as much, I may say, the view which the person who prepared it has upon the subject, as the view of the parties? for the parties to a certain degree are ignorant of the words that are used, unless they are advised by the persons they may consult; and therefore the practice of conveyancers upon subjects of this description is, I conceive, a most important consideration, and whenever that has prevailed for a great length of time without impeachment in a court of justice, I take it it ought to be considered as a true exposition of the law.

SMITH
v.
EARL JERSEY

[*461]

I have thought it necessary to say so much upon that part of the case, because I think it would be highly dangerous to treat it in the manner in which it has been treated by a learned Judge, and, with great deference, I cannot agree to what the learned Judge said, because I think that practice is most important to the consideration of the case if you wish to preserve property to persons who are in possession, *which may be defeated upon the construction of deeds and instruments, unless you give them

[*462]

† 3 Bro. P. C. 492; by the name of the *Earl of Bucks v. Drury*. See Eden's Rep. vol. ii. pp. 39 and 60.

‡ 27 Hen. VIII. c. 10, s. 6 [rep. Stat. Law Rev. Act, 1863].

SMITH that construction which lawyers have constantly put on them,
 v.
 EARL JERSEY though not conformable to the precise rule, supposing the
 language to be literally understood.

[*463]

With respect to the case before you, it appears to me that it is necessary only to consider, for the purpose of the final decision of this question, the very words of the instrument. Words used in an instrument of this description must be construed according to the subject to which they are applied. The words here used, and which are in question, are applied to a power over a particular description of property. The power is one power applying to three descriptions of property, and varying according to those three descriptions: First, of property which was under the settlement, let upon leases for life, or lives, or for years determinable upon life or lives: Secondly, of property that consisted of lands not under such leases, but under rack-rent leases; and Thirdly, of mines. Now is not that evidence that the persons who framed this instrument contemplated those three species of property under the different circumstances in which they stood? And what is the manner in which they contemplated that property which was leased for lives, or for years determinable upon lives? What did they mean to give by the power? As to that property they meant to give the same power of enjoyment which the person who had gone before had of the property. By the nature of that property no benefit could be derived from it for a considerable term of years *but by renewing the leases from time to time as they dropped, and therefore they gave a power to grant leases of that part, reserving what had been before reserved, in as beneficial a manner in all respects, or more, giving them the power to reserve more, but not to reserve less, not only as to the rent but as to the services. The services in every instance of a particular lease, every thing, was to be reserved exactly in the same manner as it had been reserved by the prior leases. With respect to the second description of property, there the power is to lease at the best and most improved rent, the words are added, "that can be reasonably had or obtained;" does that word "reasonably," really, and truly, though perhaps introduced from caution into it, vary the instrument the least in the world? Would it not be a sufficient

execution of the power if the best and most improved rent had been obtained according to a reasonable estimation of the best and most improved rent? I should consider that, although the rent reserved may not be the very best rent that could be got, yet if it is fairly, and honestly, and reasonably, the best rent that can be reserved, without any fine derived by the person who granted it, that it is a good lease. The word "reasonable," therefore, though introduced in this part of the instrument, is a word merely of caution, and would not alter in any degree whatever the construction of the power under the settlement.

SMITH
v.
KARL JERSEY

With respect to the two parts of the property, that which is on leases for lives, or for years determinable on lives, and that at rack-rent, there were introduced *words with respect to a power of re-entry on non-payment of rent; the first is expressed in one way, the second in another way; we find different terms used, obviously, as it seems to me, for this reason; with respect to the second description of property, the words are precise 'and so as that a clause shall be inserted, containing a power of re-entry for non-payment of the rent for twenty-eight days after it becomes due;' the words there are precise; why were they not precise in the other case? For this manifest reason, because the other power referred to existing leases; they referred to that which was the ordinary mode of executing the power with respect to such property; namely, that on the dropping of one life the lease shall be surrendered, and a new lease granted for three lives. The powers which were contained in the former leases of every description were the very powers to which the settlement meant to refer. If in any of the leases that existed there was not a power of re-entry for non-payment of the rent, they meant that such a power should be contained in future, and therefore the words there used are of loose description. I think it is a mistake to suppose the words are precise; the words are not precise; the words are loose; and the great error, as it seems to my mind, in the opinions that have been formed that this lease is invalid, is in the supposition that the words are precise; I repeat they are not precise, they are merely a note or memorandum intimating that a power of re-entry is to be reserved, and if in the former leases such a power has not been

[*464]

SMITH
v.
EARL JERSEY

[*465]

reserved, (and probably the person who made the settlement *had not an opportunity to look into all the leases, to see the form in which they were made) if such power was not reserved, then there should be such a power reserved, but in any other respect that they should be in conformity to the prior leases. It appears in the case of the lease in question that the power of re-entry was reserved in the former lease, not simply on the non-payment of rent, but it was reserved on the non-performance of the services, a service at the mill, a reservation of a capon. If the engagements were not observed the power of re-entry extended to the whole. Taking it, therefore, that the meaning of the settlement was this, not to give any precise direction with respect to the nature of the power, but to give a general direction in the nature of a memorandum, if I may so express it, that there should be a power of re-entry; is not that the natural construction of the words, and is not the construction which is attempted to be put upon the words a forced construction, an attempt to make them more strict than they really are?

[*466]

Suppose a contract was entered into between two persons, the one having the property, and the other willing to take that property, and that contract was so executed as that it purported there should be in the lease to be granted under that contract a power of re-entry for the non-payment of the rent, how would that contract be executed if it was to be specifically performed under a decree of a court of equity? Would a court of equity have ever thought they were compelled under the terms of that contract, by those words to require that the power of *re-entry should be a power of re-entry absolutely upon the non-payment of the rent at the day, and without the common and ordinary provision that it should only be in case there was not a sufficient distress? Would not those words be construed by what was the common and ordinary practice? The common and ordinary practice certainly is to frame a power of re-entry in the manner in which the power of re-entry in this lease is framed. What then must have been the mind of the person who prepared this settlement, the conveyancer who prepared that settlement, when he inserted in the settlement that a power of re-entry for non-payment of rent, should be reserved,

without expressing more? It must have been in his mind, according to the usual habit of persons of that description, and you must take it to have been in the mind of the parties to the settlement, (for it is the mind of the person who prepares the instrument that ought to give the construction of the instrument;) you must take it to have been in the mind of the person who prepared the instrument that this was a species of note or memorandum which would have been more fully expressed in the lease to be executed.

SMITH
v.
EARL JERSEY

I conceive, therefore, that in this case it must be taken to be the intention of the parties to the instrument not to be precise with respect to the terms in which the power of re-entry was to be reserved, but merely to give a note signifying that a power of re-entry should be reserved for non-payment of rent, meaning thereby that that power which was contained in the former leases, should be inserted *wherever that power did exist in the former lease of the same lands; but where no such power was reserved (if that was the case) then that a power such as would be a reasonable power in such a contract as I have mentioned should be inserted in the lease. If a power of re-entry was before reserved, the words were not necessary, because the rent was to be reserved in as beneficial a manner, and therefore if there was a power of re-entry in the former lease, that same power of re-entry, and no other, could be reserved; and therefore I do conceive that when you come to apply your minds to this particular case there really is no ground of doubt, because all the doubt that has been suggested upon the subject has been founded upon a construction of the words of this instrument, which I submit they do not by any means bear; they were not intended, as it has been supposed they were intended, to express precisely and positively what should be done; they were intended to refer to the leases that had been previously executed of the same property, that the rent should be reserved in as beneficial a manner in every respect as before; and if there was an exception in the former leases of the power of re-entry, that a power should be given, that is, such a power as a court of equity would insert in a lease, under a contract, in these loose words, directing a power of re-entry to be inserted in the

[*467]

SMITH v. EARL JERSEY lease. I take it there can be no doubt whatever that upon a contract of that description so would a court of equity act.

[*468] But suppose this had not been a question before a court of equity, but before a court of law; *suppose the person who entered into that contract had executed a lease, with a power in the terms in which the power is conveyed in this case; or suppose, on the contrary, he had executed it with a power of re-entry upon non-payment of the rent at the day, and the question had been whether in either of those cases the contract had been properly executed, or not, if the lessee had in one case objected, you have made it too strict, not according to the intention of the parties in the contract; if on the other hand it had been made in the present form, and had been objected to, that the lease was invalid, and the question had come to be agitated in a court of law, would a court of law have differed from a court of equity on the subject, if they had inquired in what manner will a court of equity execute such a contract as this? In what manner would a person employed as a conveyancer in the habits of business have framed a lease under such a contract? and then taking it to be a proper or an improper execution of the contract according to that which the habits of men engaged in the business would have led them to consider proper.

[*469] Upon the whole, therefore, it appears to me that the lease is a valid lease, because it is made, as it is found by the special verdict, in conformity to the other leases; and I consider the words of the settlement referring to those leases to have the effect of saying in this particular case,—if in any of the renewals of a lease, where there had been no power of re-entry in any particular case of that description, the question should arise how that power of re-entry was to be reserved, that it was to be reserved according to that which had been the practice *of the owner of the estate in letting leases of other parts. Because in a case where the power of re-entry was actually reserved in the former leases, for the purpose of making them conformable to the former leases, which it was evident was the manner intended, it must be made conformable to a former lease, but if there was any lease in which a power of re-entry had been omitted, then it could not have reference to that lease; but the way in which

a court ought then to act would have been to see what was the manner in which leases of property of the same description, under the same settlement, have been granted, reserving a power of re-entry; and that that would have been deemed a sufficient execution of the power under the settlement; and that the words of the power ought not to be construed as meaning that precise and positive reservation of a power of re-entry which has been contended for in this case.

Therefore it is upon the particular words of this instrument, the settlement of 1757, and not upon any general view of the case, that I conceive that this lease ought to be supported, and that the judgment of the Exchequer Chamber should be reversed, and the Judgment of the King's Bench affirmed.

Ordered accordingly.

IRELAND.—APPEAL FROM THE COURT OF CHANCERY.

WARD *v.* HARTPOLE.

(3 Bligh, 470—490.)

1776.

Lord
MANSFIELD.

[484]

[THE material facts of this case sufficiently appear from the judgment.]

The case having been argued on the 24th, 25th and 31st of January, 1776, the judgment was moved in the House of Lords to the following effect, by

LORD MANSFIELD: †

The Bill upon which this decree was made was brought by the respondent against the appellant's father, Vere Ward, to set aside a lease granted to him by the respondent's father, George Hartpole, of certain lands in the Queen's County in Ireland, in consideration of a fine of 300*l.* and a rent of 42*l.* a year, and the grounds upon which it is sought to set aside the lease, are—

“1st, That George Hartpole was only tenant for life of the lands in question under his marriage articles, with power ‘to make leases for any term of years, or for one, two, or three lives

† For this Note of the Judgment I am indebted to Mr. Palmer, of Gray's Inn.

WARD
v.
HARTPOLE.

certain, or renewable for ever, at the best improved rent without fine. Such leases to commence in possession, and not in reversion.' That the lease in question was granted on terms contrary to that power, and that therefore it is void.

"2ndly. That this lease was obtained by fraud, imposition, and misrepresentation of the value."

The appellant's father by his answer insists that the lease is good under the power reserved to George Hartpole by the marriage articles, enabling him "with the consent of the trustees, to raise any sum or sums of money for such uses and purposes as he should think fit." And the subsequent instrument executed by the trustees by which they consent "that he should raise the sum of 5,000*l.* by mortgaging all or any part of his estate, or in any other manner he should think fit." He says, that the lease was granted at the full value, and denies that he made use of any fraud or misrepresentation in obtaining it.

[485]

The first question in this case is, whether the lease now impeached, as having been granted upon a fine, is at all within the substance or meaning of the power for raising money, or can be considered as any execution of it?

Powers, especially those in family settlements, being considered as reservations of so much of the absolute dominion of the estate, are to be construed equitably, and most favourably for the grantee; and therefore, where through mistake or inadvertency the several circumstances required by a power are not strictly and formally complied with, equity will interpose and supply the defect. The power indeed cannot be exceeded; but within the extent and compass of it, a court of equity will aid all defects of circumstances, and even where powers have been exceeded the execution is not absolutely void; for the Court will correct the excess, and supply the execution as far as the power warrants.

In this case I am strongly inclined to think the decree proceeded chiefly on the ground of the lease not being warranted by the marriage articles. It is certain that the lease is not within because not made according to the power of leasing; but, upon the true construction of the power to raise money, and the consent of the trustees, and considering the known and long-established usage in Ireland, I think that this mode of fining-

down might be one way of raising the money; the articles reserve a power to make leases for any term of years, or for one, two, or three lives certain, or renewable for ever; for a notion then prevailed in Ireland that granting leases for lives renewable for ever was a very advantageous manner of letting lands; it has however been found exceedingly detrimental and inconvenient.

WARD
v.
HARTPOLE.

The power to raise money enables George Hartpole to raise any sum for such uses as he should think fit, with the trustees' consent; the trustees give their consent, and authorize him to raise 5,000*l.* by mortgage or otherwise, as he should think fit. Now, I am of opinion that by the terms of this power and the trustees' consent he was clearly warranted to raise it by fines. The power is very remarkable and very uncommon; he is enabled to raise any sum of money for such uses and purposes as he should think fit, with the trustees' consent. There is no sum mentioned; no particular mode prescribed for raising it; no restriction whatever as to the execution of the power, but that it should be with the *trustees' consent. Now this power operates as an exception, and so far as respects the execution of it, the power of leasing does not extend or interfere. When the power for raising money is satisfied, then indeed all leases afterwards made must be in conformity to the terms of the power of leasing, but those made in execution of the power of raising money, cannot be affected by it. The trustees, as I have observed, tie the tenant for life down to no particular mode, but leave it to his discretion to raise it by mortgage, or in any other manner as he should judge proper; fining-down the rents was one of those other ways; selling was another; there was no way of raising money but by mortgaging, fining-down, or selling: he was left at his option. Great part of the lands he sold; they are quietly enjoyed, and no question is made as to the validity of those sales; why then might not money be as well raised by fines? It can make no difference by what means it is raised provided the value is given. I am clearly of opinion that it might be raised by fines, and that so far the lease is a good execution of the power under the trustees' consent.

[*486]

There was an argument made use of that the whole money

WARD
v.
HARTPOLE.

and more had been raised by sale of the lands, and consequently that the 300*l.* paid for the lease could not have been raised as part of the 5,000*l.* But this will not hold, for that money was not raised for some years after granting the lease, and the lease takes notice that the 300*l.* was raised as part of the 5,000*l.*; and if the lease was good at the time of making, nothing done afterwards can invalidate it, if then the lease was within the power.

The next question is, whether there was any collusion or connivance between George Hartpole and the appellant's father in making this lease, or any practice or fraud made use of by Ward in his relation of agent to the respondent's father in obtaining it.

If there were any collusion between the tenant for life and the lessee, or any undue practices on the part of the latter to the prejudice of those in remainder, that would afford a sufficient ground for setting aside the lease, but it does not appear there was; there is no proof of it; the fine taken is no secret; it is rected in the body of the deed, and in the receipt it is mentioned to be raised as part of the 5,000*l.* under the trustees' consent and the *power. It is a strong circumstance also that the receipt is registered; for though this is taken notice of on the part of the respondent as a contrivance to answer some unfair purpose, yet here it was highly proper, in order to shew that the sum of 300*l.* had been raised in part of the 5,000*l.*; there is no evidence of any misrepresentation; and it is not pretended that the respondent's father was a weak extravagant man, liable to be easily misled or imposed upon, or that he did not apply the money thus raised to a good use; on the contrary, it appears that he very laudably applied it in paying off debts and discharging encumbrances to a very large amount, which descended upon him with the estate.

The last question, therefore, is, whether there was any fraud in this transaction as to the rent reserved by the lease? for if there was, it being to the prejudice of the heir, or person next in remainder under the articles, the lease would not be good as against the respondent.

Now with respect to the value of the lands there is a good deal of contradictory evidence, and if the decree turned upon

WARD
v.
HARTPOLE.

that point further inquiry might be ordered to ascertain the value; an issue could be directed. But I am unwilling that the parties should continue any longer in litigation, especially as upon the most attentive consideration of the evidence I am of opinion that sufficient appears to shew that the rent reserved upon this lease was not the full value. From the evidence of one of Ward's own witnesses, and by his own accounts, as stated in the Appendix to the respondent's case (which seems to be accurate), it appears most clearly that the lands were let at an undervalue. [Here his Lordship stated the calculation of the value of the lands from the Appendix, observing, that six per cent. should be computed for the interest of the fine of 300*l.* that being the legal interest in Ireland, instead of five per cent., which was only allowed in the calculation.] The account of Ward himself proves that the lands were worth 80*l.* 17*s.* 8*d.* a year, whereas the rent reserved by the lease, together with the interest of the fine at six per cent. is only 60*l.*, so that either the fine was inadequate, or the rent considerably below the value. If then the lease was not taken at the best improved rent, but at an undervalue, it ought not to stand, especially if any advantage *was taken of George Hartpole's situation, of his necessity and distress in obtaining this lease, equity will relieve against it. That such an advantage was taken I am strongly inclined to believe; and what weighs with me is this,—the respondent's father was a gentleman, like many others, involved in a great number of law-suits and difficulties,† and his affairs were exceedingly embarrassed: Ward was his agent and attorney, and consequently well acquainted with his situation, and seems to have been very ready to take advantage of it. This appears from a remarkable letter of Ward to Hartpole, dated the 8th November, 1733, which is proved in the cause, and stated in the Appendix to the respondent's case: in this letter Ward recommends "Fortitude to Mr. Hartpole in the gloomy appearance of his affairs, and vigour in opposing the various suits and difficulties he was engaged in:"—takes notice of his own conduct, and the expense of the suits, and desires to know "Whether Mr. Hartpole would have the accounts between them appear

[*488]

† See *Kenrick v. Hudson*, in the House of Lords, 1773.

WARD
v.
HARTPOLE.

in the shape of bills of costs, or fix a certain annual sum in lieu thereof." What, an attorney requires a certain annual sum! Why not his bill? But your Lordships will find he did not forget his bills. In one bill, amounting to 75*l.* 11*s.* is this article, "For attendance and care of several affairs relating to Mr. Stevenson, and other creditors, from 1781 to 1784, 30*l.*" And in another bill, the amount of which is 25*l.* there is this charge, "Attendance on Mr. Hartpole's affairs, in general, &c. from July, 1784, to May, 1786, 15*l.*" Such general charges as these most certainly would not be allowed to any attorney here.

[*489]

We see then the distresses which Mr. Hartpole laboured under, and the disposition of Ward. In this situation the one was very apt to give, and the other too ready to take a good bargain. And if an attorney, knowing his client to be in such circumstances, takes from him any reward, or any security by way of gratuity or reward, pending the suits or business in which he is concerned, though no particular express act of fraud is proved, yet it shall not stand; it would be attended with dangerous consequences, and therefore it shall not be allowed. I remember the case of one Japhet Crook, a most vile miscreant, who had been engaged in various suits and scrapes, indicted for perjuries, *forgeries and other crimes, and promised his attorney, who had been useful in procuring bail for him, and otherwise, as a compensation above his bill, to leave him 1,000*l.* by his will; and he gave the attorney instructions for preparing his will, with such a legacy, which he executed. The attorney afterwards, lest Crook should change his mind, got a bond from Crook to oblige him to leave the 1,000*l.* by his will. They afterwards quarrelled, and Crook made a new will, in which he omitted the legacy, stating as his reason that he had been imposed upon by his attorney; and he soon afterwards died possessed of a considerable fortune. The attorney sued the representative, who filed a bill to set aside the bond. The attorney put in his answer, and the cause came on to be heard before Lord HARDWICKE. At first it did not stand a minute; no fraud was proved to have been made use of by the attorney, and the bill was dismissed. I, however, advised a

re-hearing, and the cause came on again ; and though there was no proof of fraud having been practised in obtaining the bond, yet from the general danger of establishing a precedent of an attorney taking such a security from a client in distress, as well as from the particular circumstances under which the bond was given, Lord HARDWICKE reversed his own decree, and referred it to the Master to consider whether the attorney was entitled to any and what allowance.†

WARD
v.
HARTPOLE.

The lease in question was granted for a consideration grossly inadequate ; Hartpole knew it, but his distress compelled him to give way. Ward availed himself of the advantage of his situation, and thus obtained it at an undervalue. I am, therefore, of opinion that upon the ground of undervalue, coupled with the other circumstances which I have stated, the lease is void as to the respondent, and that it should be set aside. But upon what terms should this be done ? It is a maxim, that he who demands equity must render it ; and when a man lays out money in lasting and useful improvements, and has not the benefit of them, why should he not be allowed for it ? It is surely but just, as the respondent has the advantage of the improvements made by the appellant's father on the lands, and the defendant is prevented from enjoying them, that some compensation should be made to him. Why should not the fine be paid back ?

The decree saves a remedy against the personal representatives of George Hartpole on his covenant, and yet dismisses the cross-bill for want of a representative being before the Court, although it is clear that the respondent had possessed and administered his father's assets, and thereby became executor *de son tort*, so that such representative would have been necessary in point of form only, for the account must have been taken against the respondent, and therefore the bill should not have been dismissed upon this ground. But the account might have been taken against the respondent, giving the appellant liberty to bring a legal representative before the Master, or have ordered the cause to stand over, with liberty to amend the bill, and

[490]

† See *Walmesley v. Booth*, 2 Atk. 25, 27.

WARD
v.
HARTPOLE. bring the proper parties before the Court. But what I shall propose will render this unnecessary.

There is another circumstance,—the costs. Costs, I take it, were given upon the ground of the lease having been obtained by fraud; but I think in this case each party should bear his own costs. I therefore submit the following variations; viz.,

1st. That the lease be set aside upon payment to the appellant of the fine of 300*l.* and the money laid out in the lasting improvements, with interest from the death of George Hartpole; and that an account be taken of the said 300*l.* and money laid out in improvements.

2ndly. That so much of the decree as gives costs in the original or cross-cause, or saves any remedy against the representatives of George Hartpole, or enjoins the respondent to be put into immediate possession, be reversed.

Which variations were agreed to by the House.

SCOTLAND.—APPEAL FROM THE COURT OF SESSION.

STIRLING *v.* FORRESTER.†

(3 Bligh, 575—598.)

A bank having discounted bills to the amount of 8,000*l.* which were dishonoured, the acceptors, becoming bankrupts, agree with the drawers to retain the dishonoured bills and receive the dividends which might become payable from the bankrupt estates; and, as additional security, to take four promissory notes, indorsed by four sureties, for 2,000*l.* each, to guarantee the unsatisfied bills, or any balance upon them which might remain unpaid, to the extent of 2,000*l.* each. This agreement having been carried into effect; when the notes were nearly due, upon the application of the original debtors for delay of payment, the bank gave up one of the promissory notes, and accepted a new one from the surety who had indorsed it; renewed notes were also given by two other of the sureties, and with the fourth surety a treaty was carried on respecting a renewal, pending which he died. The dishonoured bills had also been delivered over by the bank to the original debtors, upon the treaty for the renewal of the notes.

Held: (reversing *pro tanto* the judgment of the Court below,) that the fourth surety and his estate, by the legal effect of the transaction, was discharged as to three-fourths, and liable only as to one-fourth, of the balance due upon the dishonoured bills, after giving credit for all monies *received or receivable from any of the parties upon the bills, or their estates; and that, on payment of the fourth part of that balance, the bank were responsible to the estate of the fourth surety for all future dividends upon the dishonoured bills.

A COMPANY conducting business at Dunfermline, under the firm of James and George Spence, employed Mr. Paterson, banker in Edinburgh, as their money-broker and banker, lodging in his hands the bills which by the usage of their trade they obtained from their customers at long dates. In return, Paterson and his agents in London, Robertson, and Stein, and Tod and Company, accepted bills drawn by Messrs. Spence, which were discounted with Mr. Hunt, the agent for the Bank of Scotland at Dunfermline. Mr. Hunt, and his cautioners in the bond granted, in consideration of his official trust, were liable to the Bank for these discounted bills, and all consequent loss.

In the autumn of 1810, Mr. Paterson and his agents failed, leaving unretired with the Bank of Scotland acceptances of bills drawn by Messrs. Spence to the extent of 8,200*l.* Being liable

† *Duncan v. North and South Wales Bank*, (1880) 6 App. Cas. 1, 50 L. J. Ch. 355; *Steel v. Dixon*, (1881) 17 Ch. D. 825, 50 L. J. Ch. 591.

1821.
March 19.
June 13.
—
Lord
ELDON, L.C.
Lord
REDESDALE.
[575]

[*576]

STIRLING
F.
FORRESTER.

[*577]

for these acceptances, Messrs. Spence proposed that the Bank should retain the acceptances by Mr. Paterson and his agents, and draw the dividends which might be due from the bankrupt estate; and for additional security, that four gentlemen should guarantee the unsatisfied bills, or any balance upon them that might remain unpaid, to the extent of 2,000*l.* each. This proposal was accepted by the directors of the Bank; and accordingly Mr. Mackenzie, the appellants' constituent, indorsed to Mr. *Hunt a promissory note for 2,000*l.* at eighteen months, granted by Messrs. Spence, and bearing date December 1st, 1810. Similar notes of the same date and currency were indorsed to Mr. Hunt, one by Mr. John Spence, another by Mr. Beatson, and a third by Mr. Haig. All these notes were then indorsed by Mr. Hunt to Mr. Forrester, treasurer of the Bank of Scotland, the respondent; and the unsatisfied bills were also placed in his hands.

The form of the obligation was a promissory note by James and George Spence to Mr. Mackenzie, dated 1st December, 1810, and payable eighteen months after date, indorsed by Mr. Mackenzie to Mr. Hunt, and by Mr. Hunt to the respondent, as treasurer of the Bank.

When the promissory notes thus obtained became nearly due, Messrs. Spence again applied to the directors of the Bank for further delay of payment, requesting at the same time that their note indorsed by Mr. John Spence might be given up.

[*578]

In answer to this application, by a letter from the accountant of the Bank, dated the 27th of April, 1812, after stating the balance due on the discounted bills, and the manner in which the payment of that balance was collaterally secured, Messrs. Spence are informed that the directors agree to the liquidation of the balance by a bill or note from Messrs. Spence, jointly and severally with Messrs. Beatson, Haig, Mackenzie, and Hunt, payable three months after date. By another letter of the same date, Messrs. Spence are informed that "the directors have ordered their new promissory *note, indorsed to them by Mr. John Spence, for a balance of 1,997*l.* 4*s.* 2*d.* due on the bills specified in the letter, and according to an account therein stated, to be discounted, and applied in payment of the balance on the

dishonoured bills before specified, being that part of the dishonoured bills which had been accepted by Robertson and Stein, which were inclosed in the letter, and directed to be given up (unconditionally), together with the original note for 2,000*l.* indorsed to them by Mr. John Spence, as guarantee."

STIRLING
v.
FORRESTER.

Some time after this transaction, but at what time does not appear, the bills were again restored to the Bank; and in the accounts exhibited by the Bank, which were made up to the 5th of October, 1813, credit is given for the dividends received upon them.

The directors had taken a renewed promissory note, indorsed by Mr. John Spence, surgeon, Royal Navy, dated 27th April, 1812, at three months, for 1,997*l.* 4*s.* 2*d.* in lieu of the original note for 2,000*l.*; and according to the proposal made by Messrs. Spence, they expected to receive other three notes, each indorsed by one of the three gentlemen whose original notes were to fall due on the 4th June, 1812.

On the 8th of May, 1812, Mr. Mackenzie wrote to Mr. G. Spence a letter, in which, after noticing that the bill for 2,000*l.* which he had accepted was about to fall due, and that a dividend would be paid out of Paterson's estate, he says, "in that case I trust the Bank will not object to renew the bill."

On the 11th May, 1812, Mr. George Spence *wrote to Mr. Mackenzie, informing him of the new arrangement made with the Bank, that a new note for the whole amount would be forwarded for his indorsement, and if any dividend should be received on the dishonoured bills, it would be placed by the Bank to the credit of the new bills given for their security.

[*579]

Mr. Mackenzie being unwell when he received this letter, his daughter, Miss Mackenzie, wrote a letter, dated the 13th May, 1812, to his agent Mr. Pearson, desiring him to inform Mr. Spence that her father would accept the 2,000*l.* bill when sent.

In answer to this letter, Mr. Pearson, on the 14th May, 1812, wrote to Miss Mackenzie, to inform her that he should mention to Mr. Spence what she stated as to the 2,000*l.* bill.

On the 15th May, 1812, Messrs. Spence wrote to Mr. Mackenzie as follows: "I now enclose for your indorsation our note to you for 2,000*l.*, at three months, from 3rd June, 1812, which

STIRLING
v.
FORRESTER.

please indorse above Mr. Charles Hunt's name. As this bill is to lie with the Bank of Scotland, and to be applied for our account and behoof solely, we hereby oblige ourselves to free and relieve you of the same, when due, and also oblige ourselves to give you any satisfactory line necessary. We omitted to mention above, that this bill is to retire ours for the same amount, indorsed by you, due the 1st—4th June, 1812, and that upon lodging this bill with the Bank of Scotland they give up the other one, which we will return you."

Mr. Mackenzie died on the 21st of May without having indorsed the new promissory note.

[580]

On the 2nd of June, 1812, Messrs. Spence wrote a letter to the Bank, enclosing their new promissory notes, informing them that Mr. Mackenzie had died before he could fulfil his promise of indorsement, and suggesting, that as Mr. Mackenzie had intended and engaged to indorse the note, it would be the same security to the Bank to let the old note lie over for three months. But the directors would not agree to accept of the new note without the indorsement; and Mr. Mackenzie's original note when it fell due was protested "at the instance of Robert Forrester, Esq. treasurer to, and for behoof of, the Bank of Scotland, the holder, against James and George Spence, manufacturers in Dunfermline, the grantors, John Mackenzie, Esq. indorser, and Charles Hunt, late agent for the Bank of Scotland at Dunfermline, also indorser.

This protest was intimated to Mr. Mackenzie's representatives, by an official letter from the Bank, and was also duly recorded in the books of session.

On the 24th May, 1813, the directors demanded from Mr. Mackenzie's representatives payment of the sum contained in the promissory note which he had indorsed, which being refused, an action was brought by the respondent in the name and on the behalf of the Bank of Scotland.

The case having come before Lord Alloway, as Ordinary, his Lordship, after hearing counsel, granted a diligence for recovering writings, and appointed the appellants to state in a condescendence the grounds of their defence. Such a condescendence having been lodged, and followed by answers, and

the documents upon which both parties founded having *been produced, the Lord Ordinary pronounced the following interlocutor: "The Lord Ordinary having considered the condescendence for the defenders, answers thereto for the pursuer, productions and whole process, finds, that this action proceeds on a bill granted to the late Mr. Mackenzie by Messrs. Spence, and discounted by Mr. Hunt, as the agent for the Bank of Scotland at Dunfermline: finds, that this bill was indorsed by Mr. Mackenzie, together with other three bills, by Mr. Haig, by Mr. Beatson, and Mr. John Spence, for 2,000*l.* each, in order to operate to the Bank of Scotland as a security for a sum exceeding 8,000*l.*, in which Messrs. Spence then stood indebted to the Bank, arising from the returned bills of David Paterson, Robertson and Stein, and Tod & Company, which Messrs. Spence had negotiated with the Bank: finds, that when the bills indorsed by Mr. Mackenzie and the three other gentlemen became due, although Mr. Mackenzie was not a joint obligant for the 8,000*l.*, and could only be liable upon his separate obligation for the 2,000*l.*, yet, as it appears from Mr. Sandy's letter that the Bank were well acquainted with the nature of the transaction, and that these four obligants had merely interposed their security for Messrs. Spence to the amount of 2,000*l.* each, in relief of 8,000*l.* due by the Spences to the Bank, so the Bank could only have proceeded against them by giving them a proportionable and equitable relief of the debts which they had been able to recover from the original obligants: finds, that, although it is alleged that the Bank had given *up to Messrs. Spence the bills which they held of Robertson and Stein, which formed part of the 8,000*l.*, yet this was done merely for the purpose of drawing the dividend from Robertson and Stein; and, this being done, these bills were again restored to the Bank; and credit is given in the accounts exhibited by the Bank for the dividends so drawn: finds, that when the four bills for 2,000*l.* each became due, Messrs. Spence had applied to their friends and to the Bank for a renewal of the same for three months; and that it is instructed by Miss Mackenzie's letter, written by her father's order, that he had also agreed to renew his obligation for three months; and Mr. Haig, Mr. Beatson, and Mr. John Spence,

STIRLING
v.
FORESTER.

[*581]

[*582]

STIRLING
v.
FORRESTER.

having also consented to a renewal of their obligation, new bills upon their part were discounted; but Mr Mackenzie having died after the bill had been sent to him to be signed, his bill was not renewed, but the former bill was protested, and duly intimated to the representatives: finds, that in these circumstances the renewal of the other three bills, and Mr. Mackenzie having previously assented to a renewal, cannot entitle his representatives to be relieved of the payment of his bill: finds, that the intimation to his representatives of the dishonour of the bill upon which Mr. Mackenzie stood bound, put in their power to have brought the matter to a close, and to have insisted that the Bank should immediately close the account, and receive their proportion of the loss corresponding to Mr. Mackenzie's obligation of 2,000*l.*, but so as not to exceed that sum: finds, that nothing
*583] has been stated *upon the part of the defenders to shew that the Bank had attempted to give any of the obligants the least preference over the rest; and as it is not disputed that the balance due to the Bank still greatly exceeds the sum of 2,000*l.* contained in the promissory note indorsed by Mr. Mackenzie, after giving credit for all the sums which they have been enabled to recover from the other obligants, decerns against the defenders as Mr. Mackenzie's representatives, for payment of the sum contained in the said promissory note, with interest thereon since the same became due."

Upon this judgment, the respondent gave in a representation, in which he prayed the Lord Ordinary to alter the interlocutor, in so far as it connected Mr. Mackenzie's note with the other three promissory notes, and either at once to decern generally against the appellants; whereupon the Lord Ordinary superseded advising this representation, until the representation, and additional representation upon the part of Mr. Mackenzie's representatives, came to be advised. And on advising the same, with the representation for the appellants, he refused the representation, and adhered to the interlocutor complained of.

Two other representations on the part of the appellants were followed by similar decisions.

Both parties reclaimed by petition to the First Division of the Court; and the petition of the appellants was disposed of by this

interlocutor : “ The Lords having heard this petition, they refuse the desire of it, and adhere to the interlocutor reclaimed against;” and, of the same date, their Lordships *pronounced as follows, on the petition of the respondents : “ The Lords having resumed consideration of this petition, they refuse it as unnecessary.”

STIRLING
v.
FORRESTER.
[*584]

The parties again offered petitions against these interlocutors, when the following judgment was pronounced on both : “ The Lords having heard this petition, they refuse the desire of it, and adhere to the interlocutor reclaimed against.”

The cause having afterwards come to be heard before the Lord Ordinary, on the point of expenses, the question was remitted to the auditor, with the instruction, that, in taxing the amount, he shall strike out the expense of the representations and petition for the Bank ; and, finally, judgment was pronounced, approving the auditor's report, and assessing the expenses to the sum of 80*l.* 14*s.* 11*d.* for which, and the dues of extracts, decerns.

Against the interlocutors of 24th November, 1815, 17th May, 11th June, 4th July, 28th November, and 10th December, 1816, and of 22nd January, 1817, the appellants entered their appeal. The respondent also, on his part, took the necessary measures for keeping open the interlocutors, in so far as they tended in any degree to limit the foundation of his argument. A cross-appeal was entered for that purpose.

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In the course of the argument the following observations were made :

[589]

THE LORD CHANCELLOR :

If this were the case of an entire debt, there is no doubt that giving time would discharge the surety. It is clear that, in the circumstances stated, J. Spence could not have been called on for contribution. The transaction with the Bank effected an absolute discharge. It is a new and important question. Suppose the guarantee had been confined to the 2,000*l.*; was it not discharged by the transaction with J. Spence? Is it not discharged to the amount which J. Spence would have been liable to contribute? If the giving up of the bills does not effect a discharge of the sureties, then the amount of the dividend upon them is to be

STIRLING
F.
FORRESTER.

[*590]

received for the sureties. But is a surety to be put in the situation of being driven into the account of a bankrupt estate, and the question what it may or may not pay? In another point of view, the bills of Robertson and Stein, *provable under the bankruptcy, were considered as part of the original security. The sureties had a right to stand as *cestui que* trust of the proof. The sureties might thus have received more than they could in any other way. The case† before Lord Kenyon is material. Formerly it was thought that the remedy was only in equity; but in that case it was held, that if one in the nature of surety paid a debt, he might bring an action against the parties liable for the debt. Until I became acquainted with that case, I thought the remedy must be in equity.

LORD REDESDALE :

In the account, credit is given for part of the debt from Robertson and Stein; the respondents give up the old note, take a new security for a different one from John Spence, and, as part of the transaction, give up to him the bills from Robertson and Stein, and the benefit of the dividends.

The principle established in the case of *Dering v. Lord Winchelsea*‡ is universal, that the right and duty of contribution is founded in doctrines of equity; it does not depend upon contract. If several persons are indebted, and one makes the payment, the creditor is bound in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors. The cases of average in equity rest upon the same principle. It would be against equity for the creditor to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment. He is bound, seldom by contract, but always in conscience, as far as he

† *Exall v. Partridge* (1799) 4 R. R. 656 (8 T. R. 308).

‡ 1 R. R. 41 (1 Cox, 318; 2 Bos. & P. 270). This passage of Lord REDESDALE's judgment is cited by Lord BLACKBURN in *Duncan v. North & South Wales Bank* (1881) 6 App. Cas. 1, 19; 50 L. J. Ch. 355, 362;

and again in the judgment of the Judicial Committee in *Ward v. National Bank of New Zealand* (1883) 8 App. Cas. 755, 765; and again in the judgment of STIRLING, J. in *Bacon v. Camphausen* (1888) 58 L. T. 851, 852.—R. C.

is able, to put *the party paying the debt upon the same footing with those who are equally bound. That was the principle of decision in *Dering v. Lord Winchelsea*; and in that case there was no evidence of contract, as in this. So in the case of land descending to coparceners, subject to a debt; if the creditor proceeds against one of the coparceners the others must contribute. If the creditor discharges one of the coparceners, he cannot proceed for the whole debt against the others; at the most they are only bound to pay their proportions.

STIRLING
v.
FORRESTER.
[*591]

THE LORD CHANCELLOR :

March 19.

This is a question as to transactions between a creditor and a principal debtor and sureties; and, as to the effect of this transaction, upon the liability of co-sureties. The judgment of the Court below cannot stand in all its parts. It will be necessary, in moving judgment here, to state clearly the doctrines on which we proceed. In the mean time the agents must give answers to the following inquiries: 1. What became of the bills drawn by George Spence, and accepted by Paterson? Whether the bills have been proved against the estates of the several parties, and whether any and what dividends have been received? 2. In what state the bills stand, and who is entitled to a dividend, if made? The result of these inquiries may assist those who have to advise the House upon the judgment. The case is extremely important, as it regards the doctrines of equity upon the liability of co-sureties.

THE LORD CHANCELLOR :

June 13.

In this case, it appears that the firm of James and George Spence employed* Mr. Paterson as their money broker and banker. It is represented that the transaction was carried on by their lodging bills in his hands, and, in return, drawing bills on him and his agents in London; which, being accepted by them, were discounted with the agent for the Bank of Scotland. Paterson and his agents having failed, leaving the bills, drawn by Messrs. Spence to a large amount, unsatisfied in the hands of the Bank of Scotland. Upon this event, it was agreed that a security should be taken from four sureties, to guarantee to the

[*592]

STIRLING Bank the payment of any balance upon the unsatisfied bills,
FORRESTER, which, after receipt of the dividends from the bankrupt estates, might remain unpaid, to the amount of 2,000*l.* each. Four promissory notes for 2,000*l.* were accordingly made by Messrs. Spence, and indorsed to the treasurer of the Bank, in whose hands the unsatisfied bills were also placed for the purpose of receiving the dividends.

It is represented in the printed case, on the part of the appellants, that although the securities are in form separate, it was in fact one individual transaction. This is a very important part of the question. If the securities were in effect separate, then each surety had nothing to do but with his own; but if it was one transaction of joint suretyship, then, when there has been a dealing with any of them, the others have a right to look to that dealing as affecting them. When the notes were nearly due, it appears that by an arrangement between Messrs. Spence and the Bank, other notes, granted by Messrs. Spence, and indorsed by the sureties, were to be substituted, payable three months after date; and the original note, with the indorsement of one *of the sureties (Mr. J. Spence), was to be, and was, in fact, given up before this transaction was completed. Mr. Mackenzie died without having assented to the renewal of the notes, as the appellants allege. The respondents contradict that allegation; but I think it appears from the evidence that a treaty was pending, which was not carried into actual agreement.

[*593]

Under these circumstances, the Bank refused to delay their remedy upon the old note for three months, or to accept of the new note without the indorsement of Mr. Mackenzie; and when the original note fell due, it was protested, and an action was brought upon it against the representatives of Mr. Mackenzie. By the first interlocutor in this action, it is found that the Bank could not have proceeded against the sureties without giving them a proportionable and equitable relief of the debts which they had been able to recover from the original obligants; that the bills of Robertson and Stein had been given up merely for the purpose of drawing the dividend, which, being received, were credited in the account, and the bills returned to the Bank; that

Mr. Mackenzie having assented to a renewal, his representatives were not entitled to be relieved from the payment of the original bill; that after the intimation of the dishonour they might have brought the account to a close, and paid their proportion of the loss; that there was no proof that the Bank had given a preference to any of the obligants; and as the balance due to the Bank, after giving credit for the monies recovered from the other obligants, exceeded 2,000*l.* that the pursuer was entitled to recover.

STIRLING
v.
FORRESTER.

On the part of the appellants it is contended, in contradiction to the finding of this interlocutor, that the bills of Robertson and Stein were given up, not merely for the purpose alleged, but actually and irrevocably, and that the situation of the sureties by that act was altered, and the obligation of Mackenzie thereby released.

[594]

The four promissory notes may be considered as one transaction of suretyship. They are separate in form; but the effect in equity, as to the obligation of the parties, was such, that the creditors were bound to act as if all the notes formed one transaction of suretyship. The ground of complaint against the interlocutor was fully argued at the Bar, and is stated in the cases. It will be necessary, in considering the merits of the appeal, to attend particularly to the matter of the correspondence. An application having been made to the Bank by Messrs. Spence for delay of payment, and the delivery of their note indorsed by Mr. John Spence, by a letter of the 27th of April, 1812, Messrs. Spence are informed that the Bank will accept, for the balance stated to be due, a new bill from them, jointly and severally with the former sureties. By another letter of the same date, it appears that the bills of Robertson and Stein are directed to be given up, together with the original note for 2,000*l.* indorsed by Mr. John Spence. In consequence of these transactions it is insisted by the appellants, that the four indorsers of the notes are to be considered as co-sureties, and ought to have in equity all the relief usually given in favour of sureties when the creditor deals with the principal debtor. Their situation is not to be made worse than if no such *transaction had taken place. By the appellants it is contended, that this transaction put an

[* : 95]

STIRLING
v.
FORRESTER

end to the whole demand upon Mackenzie's representatives. The respondents contend, that at all events the effect was only partial. If the transaction did not put an end to the whole demand, it is necessary to consider what was the effect of the transaction with regard to Mackenzie's representatives, and so far only to relieve them. Under all the circumstances of this case, the latter is the true principle of decision; we cannot go the whole length of the doctrine for which the appellants contend.†

LORD REDESDALE :

This is a case of very great importance, as applicable to all questions where one or more persons make themselves debtors for others as sureties. The cross-appeal was waived; it quarrelled with the principle on which the judgment of the Lord Ordinary proceeded: but that principle was perfectly correct. The interlocutor finds, that "when the bills became due, although Mr. Mackenzie was not a joint obligant for the 8,000*l.* and could only be liable upon his separate obligation for the 2,000*l.*; yet as the Bank were well acquainted with the nature of the transaction, that the four obligants had interposed their security for Messrs. Spence to the amount of 2,000*l.* each, in relief of 8,000*l.* due by the Spences to the Bank; so the Bank could only proceed against them by giving a proportionable and equitable relief of the debts which they had been able to recover from the original obligants." That doctrine *is correct; and that finding should have governed all the subsequent decisions of the Lord Ordinary.

[*596]

At the Bar it was contended, that the rights and obligations of co-sureties are founded upon a supposed contract between them; and that in this transaction they entered into the obligation without communication with each other. The question depends upon equity, not upon contract; and in this case a contract is to be implied. The decision in *Dering v. Lord Winchelsea*† proceeded on a principle of law which must exist in all countries, that

† The LORD CHANCELLOR here read the minutes of the proposed order of the House. † 1 R. R. 41 (1 Cox, 318; 2 Bos. & P. 270).

where several persons are debtors, all shall be equal. The doctrine is illustrated in that case by the practice in questions of average, &c. where there is no express contract, but equity distributes the loss equally. On the prisage of wines, it is immaterial whose wines are taken; all must contribute equally: so it is where goods are thrown overboard for the safety of the ship; the owners of the goods saved by that act must contribute proportionally to the loss. The duty of contribution extends to all persons who are within the scope of the equitable obligation.

STIRLING
v.
FORRESTER.

The next question is, whether the subsequent findings of the Lord Ordinary are founded in fact; the first is, "that the bills of Robertson and Stein were given up to the Bank merely for the purpose of drawing the dividends." That is somewhat disputable; and the fact rather different from what is stated in the finding. It is there found that "Mr. Mackenzie had assented to a renewal of the note." That seems not to be the case, for he died without giving a final consent to the renewal. *Under the circumstances of the case the effect of the transaction seems to be, that the Bank, by their conduct, took upon themselves the situation and obligation of the other sureties with respect to Mackenzie; and therefore the Bank can only demand one-fourth of the sum secured from his representatives, because Mackenzie was originally liable to no more.

[*597]

The Bank having given time, without obtaining the final consent of Mackenzie, made an arrangement with the other sureties as to three-fourths of the debt. The first part of the finding of the Lord Ordinary is right and just in principle: the latter part is wrong in point of fact.

Die Merc. 13 June, 1821.

Find, that the Governor and Company of the Bank of Scotland, having accepted the promissory note of James and George Spence to John Spence, and indorsed by him and Charles Hunt, in substitution for the balance due on the bills in the proceedings mentioned, drawn by James and George Spence on, and accepted by, Robertson and Stein, are not entitled to make any demand against the estate of James Mackenzie, deceased, upon the indorsement of the said John Mackenzie on the promissory note

STIRLING
*
FORRESTER.

[*598]

of James and George Spence, dated the 1st of December, 1810, in the proceedings mentioned, in respect of the said bills drawn by James and George Spence on, and accepted by, Robertson and Stein : further find, that, under the circumstances of this case, the said Governor and Company are entitled to demand against the estate of the said John Mackenzie, on the said promissory note of the 1st of December, 1810, one-fourth part only of the balance which shall appear to be due to the said Governor and Company from the said James and George Spence, in respect of the several bills drawn by the said James and George Spence on, and accepted by, D. Paterson, Todd & Company, in the proceedings mentioned, after giving credit for all the sums of money received by the said Governor and Company, or which might have been received by them, from all or any of the parties to such bills respectively, or their respective estates, towards discharge of the debt due to the said Governor and Company upon such bills : and it is therefore ordered and adjudged, that the several interlocutors complained of in the said original appeal, so far as they are inconsistent with these findings, be, and the same are hereby reversed : further ordered, that the cause be remitted back to the Court of Session in Scotland, to ascertain the balance due from the estate of the said John Mackenzie to the said Governor and Company according to such findings : and the Lords further find, that upon payment of such fourth part of such balance, the said Governor and Company are bound to answer to the estate of the said John Mackenzie one-fourth part of any future dividends, which, after the adjustment of the said account between the said Governor and Company and the estate of the said John Mackenzie, according to the findings aforesaid, may become payable to the said Governor and Company from the several parties to the said bills, drawn by James and George Spence on, and accepted by, D. Paterson and Todd & Company, in respect of such bills respectively : and it is further ordered and adjudged, that the said cross-appeal be dismissed this House, and that the said interlocutors, so far as they are therein complained of, be affirmed.

ENGLAND.—APPEAL FROM THE COURT OF CHANCERY.

CHOLMONDELEY v. CLINTON.

1821.

(4 Bligh, 1—125.)

[THIS was an appeal from the decision of PLUMER, M.R. reported upon the further hearing in 2 J. & W. pp. 1—206, for which see next page, and also reported upon the original hearing in 2 Mer. pp. 171—362, of which a short note will be found in 16 R. R. 167.]

The decision upon the further hearing, and upon the present appeal, turned upon the application in equity of statutory periods of limitation for the protection of equitable titles and the extinction thereby of equitable demands as affecting real estate.

Upon the present appeal Lord ELDON, L.C. at 4 Bligh, 105, and Lord REDESDALE, at p. 125 (after stating and discussing at great length various points which incidentally arose in the case), expressly based their respective decisions upon the ground that the suit was barred by lapse of time; and Lord REDESDALE added that it was important that it should be understood that the opinion of the House was founded upon the operation of the Statute of Limitations and not on the other parts of the case.

In that respect, this decision is practically covered by modern Statutes of Limitation, which deprive it of any future application; but there are certain subsidiary points in the case which still retain much of their original interest, which were discussed and reported at length on the further hearing before the MASTER OF THE ROLLS, and which were also commented upon by Lord ELDON and Lord REDESDALE, on the present appeal.

As most of the passages bearing upon these points, for which reference to this case is still sometimes made, are to be found in the report on the further hearing (see next page) it was thought convenient to retain those passages in their proper place, and to add at the end of that report a selection of such of the passages from the judgments of Lord ELDON and Lord REDESDALE on the present appeal as are occasionally referred to upon those points, so that any further report here of the Appeal in 4 Bligh may be dispensed with.

A concise statement of the material facts of the case, so far as necessary to explain the passages thus selected, will be found at the commencement of the report on the further hearing (see next page).—O. A. S.]

CHANCERY.

CHOLMONDELEY *v.* CLINTON.†

(Further hearing, 2 Jacob & Walker, 1—206. Affirmed by House of Lords, 4 Bligh, 1—125.)

1820.

March 10, 13,
14, 15, 16, 17.

July 5, 6.

Aug. 8, 16.

Rolls Court.

PLUMER,
M.R.

1821.

*House of
Lords.*

[1]

In a suit concerning the inheritance of settled property, where the owner of the first estate of inheritance (a peer) had by a derivative settlement by way of trust reduced his estate to a tenancy for life, with an equitable contingent remainder over at his death to the person who should succeed to his peerage: Held, that the heir presumptive to the peerage was not a necessary party, and that the trustees of the settlement sufficiently represented the inheritance in the suit.

In a suit to redeem one of two distinct properties comprised in the same mortgage, the person entitled to redeem the other property should be made a defendant. Persons claiming to have alternative rights to redeem under conflicting titles cannot be joined as co-plaintiffs.

Consideration of the relative position and rights of mortgagor and mortgagee.

Whether a devisee and heir-at-law can join in a bill claiming an equity of redemption, upon the allegation, that questions having arisen as to which of them was entitled to it, they had agreed to divide it between them. *Qu.*

The position that the mortgagee is a trustee for the mortgagor, to be received with considerable qualifications.

An agreement made by parties out of possession, to proceed in a court of equity to recover and to divide lands, &c. when recovered, is contrary to the policy of the law, as well as the statute Hen. VIII. against pre-tensed titles.

Acts done by a trustee or termor for years, cannot have the effect of adverse possession. But the rule does not apply to the case of mortgagor and mortgagee.

A mortgagee in possession, keeping no account, and making no acknowledgment, becomes owner of the estate after the lapse of twenty years.

[A SHORT note of the original hearing of this case at the Rolls by Sir WILLIAM GRANT (2 Merivale, 171) will be found in 16 R. R. 167. The bill was eventually dismissed on appeal to the House of Lords (4 Bligh, 1) upon grounds completely covered by modern Statutes of Limitation. There are, however, certain passages of general interest in the judgments delivered on this further hearing, as reported in 2 J. & W. and in the House of Lords,

† *Soar v. Ashwell*, '93, 2 Q. B. 390, 397, *per* Bowen, L. J.

which may be here conveniently set out, and a short statement of the case is here necessary to make those passages intelligible.

The plaintiffs, the Marquis of Cholmondeley and Mrs. Damer, (as heir-at-law and residuary devisee respectively of Horace Earl of Orford, who died in 1793,) claimed to redeem certain mortgaged estates in Devon and Cornwall which were comprised in a settlement made by George Earl of Orford in 1781. The mortgage also included property in Dorsetshire not comprised in the settlement (see *Palk v. Clinton*, 8 R. R. 283). The plaintiffs alleged that under the limitations of the settlement, Horace Earl of Orford became entitled to the equity of redemption of the settled property, upon the death of his nephew, the settlor, George Earl of Orford, in 1791, as heir-at-law of the settlor. The principal defendant, Lord Clinton, alleged that on the death of George Earl of Orford, the settled estates devolved under the limitations of the settlement upon R. G. W. Trefusis (afterwards Lord Clinton, the father of the defendant), and that his said father, with the acquiescence of Horace Earl of Orford, entered into possession of the settled estates accordingly, and made a second mortgage thereof in 1792, and shortly afterwards, in 1792, re-settled the same estates by vesting the same in trustees, to hold† to the use of himself for life with remainder (subject to a jointure and certain trust terms) to the use of his eldest son the defendant (Lord Clinton) for his life, with remainder to the use of the said defendant's first and other sons in tail male with similar remainders over to the said defendant's daughters in tail male, with remainder to the use of the said defendant Lord Clinton in tail. Upon the death of his father in 1796, the defendant, Lord Clinton, entered into possession and claimed to be entitled under the last-mentioned settlement subject to the mortgages. The defendant, Lord Clinton, and his late father having been successively in quiet and undisturbed possession and enjoyment of the property subject to the mortgage, for more than 20 years

† In the report in 2 J. & W. p. 4, the limitations of this settlement of 1792 are shortly stated as if they were legal limitations, but from the report in 2 Mer. 179, it appears that the limitations were by way of trust.

The names of the trustees are there given, and they were defendants to the action. As the legal estate was outstanding in the mortgagees, the exact form of the limitations may have appeared unimportant.—O. A. S.

CHOLMON-
DELEY
v.
CLINTON.

before the filing of the bill, the defendant claimed the benefit of such length of possession and of the Statutes of Limitation.

The defendant Lord Clinton had no children, and in 1809 he re-settled the estates (having previously barred the estate tail in remainder limited to him by the settlement of 1792), and by such re-settlement subject to his own life estate and to the estates limited to his sons and daughters by the settlement of 1792, the property, which was vested in trustees by that settlement, was to be held in trust for the next successor to the defendant's title and peerage in tail, with an ultimate remainder in trust for the defendant in fee. The presumptive heir to the title and peerage, (a brother of the defendant Lord Clinton) was not a defendant, nor were the persons entitled to redeem the Dorsetshire property parties to the suit, nor was the legal personal representative of the late Lord Clinton a party, although the late Lord Clinton had (as already mentioned) been in possession of the rent and profits, and had paid the interest and part of the principal of the first mortgage.

The questions thus raised as to the want of parties, and as to the joinder of two plaintiffs having conflicting claims, and as to the effect of lapse of time as a bar to the suit, are discussed in the following passages taken from the judgment of the MASTER OF THE ROLLS.

Further questions as to the construction of the settlement of 1781 and as to the effect of a deed of confirmation executed in 1794, by which Horace Earl of Orford confirmed the limitations of that settlement, were much discussed, but were eventually immaterial to the decision of the case. After dealing with the question of construction the MASTER OF THE ROLLS said :]

[132]

The questions which remain in the cause, will require a separate and distinct consideration. In the examination of them, I shall assume, for the sake of argument, the question already discussed, on the construction of the deed of 1781, to be in favour of the plaintiffs ; and that on the death of George Earl of Orford, the title passed by descent to his uncle and heir, Horace, the preceding Earl. The objections which have been taken on the part of the defendants, may be reduced to four

CHOLMON-
DELEY
v.
CLINTON.

heads. 1st, as to the want of proper parties as defendants to the suit; 2ndly, as to the frame and nature of the bill and the relief prayed; 3rdly, as to the effect of the deed of confirmation of 1794; and 4thly, as to the question, one of the greatest magnitude and importance, of the effect of the length of time, and of the acquiescence and non-claim, that has occurred in this case.

The MASTER OF THE ROLLS * * upon the first point proceeded to observe, that it was contended on the part of the defendants, that all the persons eventually interested in the estate under the settlement, made by the late Lord Clinton, in the year 1792, ought to have been made defendants. That by the terms of that settlement, the estate, after being settled on the present Lord Clinton for life, remainder to his sons and daughters in strict settlement, (none of whom have as yet been born,) remainder to the heirs of the body of Lord Clinton, is limited over to his brothers and sisters, and others, all of whom should, it is insisted, have been parties to the suit. I think this objection is not well founded. It is sufficient to have brought before the Court the trustees of the person *in esse* entitled to the first vested estate of inheritance. Those who have contingent interests are not necessary parties. Lord HARDWICKE, in *Hopkins v. Hopkins*, states the established rule on this point. “If (says he) there are ever so many contingent limitations of a trust, it is an established rule, that it is sufficient to bring the trustees before the Court, together with him in whom the first remainder of the inheritance is vested, and all that may come after will be bound by the decree, though not *in esse*, unless there be fraud and collusion between the trustees and the first person in whom a remainder of inheritance is vested.”†

[133]

But the next objection on this head, as to another person who, it is insisted, ought to have been a party, is, I think, better founded. I mean the person entitled to the estate in the county of Dorset, which belonged to George *Earl of Orford, and formed part of the estates comprised in the original mortgage, together with the estates in the counties of Devon and Cornwall, and still forms a part of the estates comprised in the mortgage, sought to

[*134]

CHOLMOR-
DELEY
v.
CLINTON.

be redeemed by this bill. This bill is confined to the estates of Devon and Cornwall, they having been alone for the reasons before given, included in the deed of 1781. But the estates in all the three counties are equally subject to, and comprehended in one and the same mortgage, and must therefore all be redeemed together. The owner of part of the estate in mortgage cannot separately redeem his part. The mortgagee is entitled to insist, that the whole of the mortgaged estate shall be redeemed together; and for this purpose, that all the persons interested in the several parts of the estate as mortgagors, should be made parties to the bill seeking the account and the redemption. A mortgaged estate sold in twenty lots might otherwise be made the subject of twenty different bills for redemption, with all the consequences upon the account and the reconveyance. The same objection prevailed in this same subject, in the case of *Palk v. Lord Clinton*,† with the difference only of its being a bill by a second mortgagee, to redeem the first, when the late MASTER OF THE ROLLS stated fully his reasons for deciding, that the cause could not proceed without the owner of the Dorset estate being made a party. I think the same in the present case.

The bill is also defective in not having made the personal representative of the late Lord Clinton a party, who is stated in the bill to have been some time in possession of the rents and profits, and to have paid the interest and part of the principal of the first mortgage. His representative, therefore, is a necessary

[*135]

*party to the account to be taken of what is due upon the mortgage. The bill anticipates this objection, and states as an answer to it, that the personal representative could not be found. That is negatived by the answer. Mr. Cleveland is shewn to have been the executor of the late Lord Clinton, and to be still living, and his residence is mentioned.

The second head contains an objection of an opposite nature, that a party is made a co-plaintiff, who ought not to have been. I cannot say that I am satisfied this bill is properly framed, with a view to its professed object. It should have been, I think, a bill by Mrs. Damer alone, the devisee of Horace Earl of Orford, praying separately to be allowed to redeem. The Marquis of

† 8 R. R. 283 (12 Ves. 48).

Cholmondeley should not have been a co-plaintiff, but a defendant, if a party at all. I cannot understand how, as this case is circumstanced, the Marquis can properly have been united in interest with Mrs. Damer, and a joint redemption prayed, a joint account, and a reconveyance and delivery of possession to both the plaintiffs. The ground on which the bill proceeds in requiring the joint relief, is the agreement stated to have been made between the two plaintiffs. The bill, after stating the death of Horace Earl of Orford, his will and codicil, and the person who was his heir at law, cautiously abstains from any averment that the title to the estates in question passed, either by the will and codicil to Mrs. Damer, or by descent to the Marquis of Cholmondeley. It could not be as the bill states, that upon the death of Horace Earl of Orford, "your orator and oratrix became entitled to the same." One or other might become entitled, but claiming under opposite and contradictory titles, the one as devisee, the other as heir at law, they could not be both entitled. The bill states, that some questions had arisen between *the plaintiffs respecting the will and codicil of Horace Earl of Orford, as far as regarded the equity of redemption of the said mortgaged estates; and that in order to put an end to such questions, they had agreed to share the same between them. The Court is called upon to act on this agreement, by giving the joint relief. But the difficulty is how the Court can do this, without having the agreement before them proved to have existed in point of fact, and without being satisfied by an examination of the terms and nature of the agreement, that it was one which the Court ought to carry into execution. There is no evidence in the cause to prove the fact; the agreement itself is not produced, nor the terms stated, and the legality of it, as far as it is stated, seems to be very questionable. The statute of Hen. VIII. prohibited and rendered penal any contract for an estate, of which neither of the parties had been in possession for the space of one year before the contract, and the agreement in the present instance proposes, with a view to assist a title by litigation, to divide the estate of a third person, (to make the *campi partitio*) of which that person had been for more than twenty years in the sole and exclusive possession, without any participation or claim by either

CHOLMON-
DELEY
&
CLINTON.

[*136]

CHOLMON-
DELEY
v.
CLINTON.

[*137]

of the parties to the agreement. I think a court of equity ought not blindfold to assume the existence and legality of such a contract. If proved and produced, it might be necessary to call for the decision of a court of law on its legality. But in the absence of any means of information, either as to the fact or the law, the Court must, I think, consider the case as if no agreement had been made. In what way then is the Court to decide between co-plaintiffs, possessing opposite and contradictory claims to the title, each asserting a claim, and neither admitting the validity of the claim of the other? Can two co-plaintiffs be put to interplead? How is the Court to know *what was the nature of the questions, which are said to have arisen respecting the will and codicil? How can the Court decide them in this cause? and yet till they are decided, how is the Court to know whether the title is to be examined upon the principles, applying to the claim of an heir at law, (which it is insisted may be made at any time within the period of sixty years) or of a devisee, confined to twenty years? If the account and redemption, conveyance and possession, are to be decreed separately to Mrs. Damer, as the Marquis of Cholmondeley does not admit her separate title, it must be upon a previous decision in favour of that separate title, without the heir at law being heard or having any opportunity to bring forward his objections to it. The converse of this objection would hold to any decree in favour of the Marquis of Cholmondeley. How is then the Court to proceed in a bill, which is so framed, that it cannot give either joint relief to both the co-plaintiffs, or separate relief to either.

As to the third head of objection, the effect of the deed of confirmation of 1794, two questions are made. 1st, Whether, supposing the title of the late Lord Clinton not to have been good before that deed was executed, it was made good by it: and secondly, whether if it did not operate as a confirmation of the title of Lord Clinton for every purpose, yet whether it was not so *pro tanto*, to the extent of being a protection in a court of equity, to the sums of money which were advanced in mortgage, upon the faith of it. Both these appear to me questions deserving of great weight and consideration, but I shall not give any opinion respecting either of them. They will, I think, be better

considered hereafter, when the case comes back from a court of law, if it should be sent there upon the first point.

CHOLMON-
DREY
v.
CLINTON.

[The 4th and last remaining question, as to bar by lapse of time, is now completely covered by modern statutes of limitation, and it would be unnecessary to preserve a report of the case upon this point, if it had not given rise to a well-known discussion by the MASTER OF THE ROLLS of the relative position and rights of a mortgagor and mortgagee. Upon this point the MASTER OF THE ROLLS said:]

The possession of the mortgagor is stated to be the possession of the mortgagee, and never can become adverse to him. He is a mere tenant at will, having a precarious and permissive possession, the legal right of possession remaining, by admission, in the mortgagee, which he may assert at any moment he pleases. The mortgagee is a trustee for the rightful owner of the equity of redemption. Between trustee and *cestui que* trust the Statute of Limitations, and the analogy to it, never operate. The right to redeem is still admitted by the mortgagee, and all parties, to exist, and must therefore be given to somebody. Is not the Court bound to give it to the person who shews a title, in preference to him who has nothing to shew, but a possession of twenty years? Although the equitable ownership is in the mortgagor, yet his possession is of a more precarious nature than that of any other *cestui que* trust. A court of equity will not interfere to prevent the mortgagee from assuming the possession, as it would do in the case of other trustees.

[177]

These appear to have been the principal reasons assigned for this doctrine. I cannot bring myself to adopt them. The view which is taken by them of the relation subsisting between mortgagor and mortgagee, *and the character, rights, and duties separately belonging to each, is not the view which is taken and acted upon in a court of equity. The relation subsisting between mortgagor and mortgagee is one of a peculiar and anomalous nature, and is regulated not by the form of the conveyance, or the legal consequences and effect of it, but by a system of rules established by a long train of decisions, and universally adopted and acted upon in a court of equity. If the form of conveyance and the legal

[*178]

CHOLMON-
DELEY
v.
CLINTON.

title were to prevail, the absolute ownership of the estate, after the condition is forfeited, would, in the case of a mortgage in fee, belong for ever to the mortgagee, without any trust or defeasance of any kind. The mortgagor would then be reduced to the condition in which the argument represents him to be. But is that the light in which he is ever considered in equity? Is he there for any purpose ever considered as a tenant at will, holding the possession under the mortgagee? Is any point better established than that a mortgagor, after executing a mortgage in fee, and after the condition forfeited, is still considered to remain the absolute owner of the estate, as he was before, for every purpose, as against all the rest of the world, and as against the mortgagee for every other purpose, except only the security and pledge which the estate is become for the re-payment of the debt contracted by the mortgage? * * The mortgagor, who is stated to be tenant at will, when in possession pays no rent, nor is liable to any account of his rents to the mortgagee. The mortgagee, who is treated as having the only title to the equity, if he takes possession, is a bailiff without salary, bound to account for all the rents and profits. The tenant at will, therefore, in possession neither pays, nor accounts for, any rent to his supposed landlord, but the landlord, in the same predicament, becomes an accountable bailiff to his own tenant at will. The possession of the mortgagor, or the person claiming *that character, is not adverse to the mortgagee, because it is consistent with his title. The mortgagee is, therefore, not barred by any length of that possession; but the possession of the mortgagor is adverse to every other claimant of the equity of redemption, because it is inconsistent with his claim of title.

Against him, therefore, it will operate as a bar, if acquiesced in beyond the limited period. Payment of the interest of the mortgage by the mortgagor, or the person claiming to be mortgagor, to the mortgagee, is a recognition of the right and title of the mortgagee, and preserves it unbarred; but it cannot be deemed a recognition of the right or title of any other person to be the mortgagor. It is an act of a directly contrary import. By making the payment in his own name, and on his own account, he takes upon himself to do an act that belongs to the mortgagor,

[179]

[*180]

CHOLMON-
DELEY
v.
CLINTON.

and thereby virtually declares that character to belong to himself. It would be a perversion of inference to convert an act, done for the purpose of the assumption of the character exclusively to himself, into an admission of its belonging to another. The character of the possession is made to undergo an extraordinary change by applying to it the constructive reference to title. The mortgagee having declined the possession and left it, as it was before the mortgage, in the mortgagor, who continues in the actual possession and enjoyment of the rents and profits, for his own absolute use and benefit, as the equitable owner of the estate, his possession, notwithstanding, is by construction considered first to be the possession of the mortgagee; and then his, (the mortgagee's) constructive possession, is by a second construction made to be the possession of the person entitled to the equity of redemption. The character of mortgagor would thus be treated as belonging at the same time, for different and opposite purposes, to *both the claimants: first, for the purpose of taking from Lord Clinton the benefit of actual possession, and then for transferring it, through the medium of the mortgagee, to Mrs. Damer. Both these cannot be right; the character of mortgagor cannot in both ways be applied to the possession. The argument should be consistent, in treating the character as belonging throughout either to the one or the other of these persons; but it cannot be shifted, assuming the character to be vested for one purpose in Lord Clinton, and for another in Mrs. Damer. If the actual possession of Lord Clinton is to be considered independently, and without reference to the character of mortgagor, it never can be treated as the possession either of the mortgagee or Mrs. Damer. If, according to the argument, it is to be qualified by reference to the character of mortgagor, that character cannot at the same time be treated as belonging to Mrs. Damer. This double and circuitous construction begins with one principle, and ends with another that is contrary to it; the first proceeding on the principle that the possession of the mortgagor is the possession of the mortgagee; the second, inverting the order, considers the possession of the mortgagee to be the possession of the mortgagor. Neither of these constructive references to title, for reasons before given, can be

[*181]

CHOLMON-
DELEY
v.
CLINTON.

allowed to take place in a case of this nature, where the question turns upon the Statute of Limitations, or the analogy to it; the fact only of actual possession is to be considered, concerning the adverse character of which there is in this case no doubt, at least with respect to Mrs. Damer. It is said that the mortgagee is a trustee for the mortgagor, that their interests are parts of one title, and together form one entire estate; and that the admission of the title of the one is virtually and of necessity an admission of the title of the other. That the length of time cannot be set up as a bar by the mortgagee against *his *cestui que* trust, Mrs. Damer; and that the existence and validity of the title of the mortgagee being on all sides admitted, the benefit of it must be given by the mortgagee (the trustee) to his *cestui que* trust, Mrs. Damer. The equity of redemption is admitted to exist, and must, therefore, be given to the rightful, and not the tortious, owner.

[*182]

I will consider separately each of these positions, and first, as to that of the mortgagee being a trustee for the mortgagor, upon which so much of the argument is built. That the consequences contended for would not follow, even if the character of trustee did properly belong to the mortgagee, not being in actual possession, I have already endeavoured to shew. It may be proper, however, to consider how far, and in what respect, he is to be considered as possessing that character. The position is to be received with considerable qualifications, as will appear by examining what is the true character of a mortgagee, and how he is considered in a court of equity. Lord MANSFIELD, advertng to the comparisons made in respect to mortgages, has, I think, said there is nothing so unlike as a simile, and nothing more apt to mislead. A mortgagor has had ascribed to him a variety of different characters, in which there existed some points of resemblance, when it was not very material to ascertain what his powers or interest were, or to settle with any great precision in what respects the resemblance did, and in what it did not exist. But it would be productive of much error, if it were to be concluded that the resemblance was complete, in every point, to any one of the ascribed characters. The relations of vendor and purchaser, of principal and bailiff, of landlord and tenant, of debtor and creditor, trustee and *cestui*

CHOLMON-
DELEY
v.
CLINTON.

[*183]

que trust, have been applied to the relation of mortgagor and mortgagee, *according to their different rights and interests, before or after the condition forfeited, before or after foreclosure, and according as the possession was in the mortgagor or mortgagee. *Quo teneam vultus mutantem Protea nodo?* The truth is, it is a relation perfectly anomalous and *sui generis*. The names of mortgagor and mortgagee most properly characterise the relation; they are (as BULLER, J. observes, in *Birch v. Wright*,†) characters as well known, and their rights, powers, and interests as well settled, as any in the law. It is only in a secondary point of view, and under certain circumstances, and for a particular purpose, that the character of trustee constructively belongs to a mortgagee. No trust is expressed in the contract; it is only raised by implication, in subordination to the main purposes of it, and after that is fully satisfied; its primary character is not fiduciary. It is a contract of a peculiar nature, by which, under certain conditions, the mortgagee becomes the purchaser of a security and pledge, to hold for his own use and benefit. He acquires a distinct and independent beneficial interest in the estate; he has always a qualified and limited right, and may eventually acquire an absolute and permanent one to take possession, and he is entitled to enforce his right by adverse suit *in invitum* against the mortgagor; all which can never take place between trustee and *cestui que* trust. They have always an identity and unity of interest, and are never opposed in contest to each other. The late MASTER OF THE ROLLS observes, that in general a trustee is not allowed to deprive his *cestui que* trust of the possession, but a court of equity never interferes to prevent the mortgagee from assuming the possession. In this the contrast between the two characters is strongly marked. *By not interfering in this latter case, a court of equity does not, as it is supposed, in opposition to its usual principle, refuse to afford protection to a *cestui que* trust against his trustee; but the interference is refused, because the mortgagor and mortgagee do not, in this instance, stand in the relation of trustee and *cestui que* trust. The mortgagee, when he takes the possession, is not acting as a trustee for the mort-

[*184]

† 1 R. R. 223 (1 T. R. 378, 383).

CHOLMON-
DELEY
v.
CLINTON.

gagor, but independently and adversely for his own use and benefit. A trustee is stopped in equity from dispossessing his *cestui que* trust, because such dispossession would be a breach of trust. A mortgagee cannot be stopped, because in him it is no breach of trust, but in strict conformity to his contract, which would be directly violated by any impediment thrown in the way of the exercise of this right. Upon the same principle the mortgagee is not prevented, but assisted in equity, when he has recourse to a proceeding, which is not only to obtain the possession, but the absolute title to the estate, by foreclosure. This presents no resemblance to the character of a trustee, but to a character directly opposite. It is in this opposite character that he accounts for the rents when in possession, and when he is not, receives the interest of his mortgage debt. The payment of that interest, by the person claiming to be the mortgagor, is a recognition of that relation subsisting between them, but is no recognition of the mortgagee's possessing the character of trustee, much less of his being a trustee for any other person claiming the same character of mortgagor.

[*185] The ground on which a mortgagee is in any case, and for any purpose, considered to have a character resembling that of a trustee, is the partial and limited right, which, in equity, he is allowed to have in the whole estate legal and equitable. He does not at any *time possess, like a trustee, a title to the legal estate, distinct and separate from the beneficial and equitable. Whenever he is entitled at all to either, he is fully entitled to both, and to the legal and equitable remedies incident to both; but in equity, his title is confined to a particular purpose. He has no right to either, nor can make use of any remedy belonging to either, further than and as may be necessary to secure the repayment of the money due to him. When that is paid, his duty is to reconvey the estate to the person entitled to it; it never remains in his hands clothed with any fiduciary duty. He is never entrusted with the care of it, nor under any obligation to hold it for any one but himself, nor is he allowed to use it for any other purpose. The estate is not committed to his care, nor has he the means of preventing or being acquainted with the changes which the title to the equity of redemption may

undergo, either by the act of the mortgagor, without his privity, or by operation of law, by descent, forfeiture, or otherwise, and consequently, as I have already endeavoured to shew, by the operation of the analogy, to the Statute of Limitations. When the interest of the mortgage money is tendered to him from year to year by the person who, claiming to have succeeded the original mortgagor in the title to the equity of redemption, is, by the acquiescence of the rightful owner of it, allowed to remain in the quiet and uninterrupted enjoyment of the estate as the sole and admitted owner, can he be expected to refuse receiving it upon any doubts of his own respecting the title, when it is apparently abandoned by those who possess better means of judging of it, and who alone are interested in contesting it? If there is no fraud, or collusion of any kind, the fault lies wholly with those who possess the rightful title to the equity of redemption. The mortgagee is a mere indifferent stakeholder. The *real contest lies between the competitors for the estate, which, in the hands of either, must continue subject to the mortgage till paid off; when paid off, the mortgage title ends, and then, and not before, the implied trust, to surrender the estate to the person entitled to demand it, begins. If there is a question who that person is, it must be contested, not by the mortgagee, but by the parties concerned, and between them the title must be decided, in the same manner, and by the same principles, though the form in which it may be contested may differ, as it would have been had no mortgage existed. I agree, that the Court to whom the decision of the question is referred, must direct the conveyance to be made to him who shews a title, and not to him who shews none; but I do not agree that Mrs. Damer stands in the first of those predicaments, by shewing a title that once belonged to her, but which has been forfeited and lost by the operation of a public law, in consequence of laches and non-claim for twenty years; nor that Lord Clinton is in the second, who shews quiet and uninterrupted possession and enjoyment during the whole of that period. If no interest upon the mortgage had been paid by any one for the period of twenty years, possession for this length of time, either in the mortgagee, or Lord Clinton,

CHOLMON-
DELEY
v.
CLINTON.

[*186]

CHOLMON-
DELEY
v.
CLINTON.

[*187]

would have decided the question of title in favour of that possession. The laches and non-claim of Mrs. Damer must then have been fatal to her claim. The adverse possession of Lord Clinton must have prevailed; why should additional acts done by Lord Clinton, equally in derogation of her title, and in assertion of his own, and therefore affording additional *indicia* of neglect on her part, and of adverse claim on his, be productive of a contrary effect? I cannot see any ground for it in reason and principle, and there is certainly no authority for it. Payment of the interest operates between Lord Clinton *and the mortgagee, to keep alive the mortgage debt. It is a continued mutual recognition of his title as mortgagor, and that of the person to whom the payment is made as mortgagee. But it has no effect beyond this, or with respect to any other person, except as it tends to exclude the title of any other person to either character. It is an acknowledgment of the title of the original mortgagor, but it is no admission of any title since derived under him, other than that of the person making the payment. To avoid the bar, the title to the equity of redemption, as to every other real estate, must have been either claimed by the party out of possession, or admitted by the party in possession within the twenty years. Mrs. Damer's title has neither been claimed or admitted within that period, and therefore cannot now be received.

Constructive possession, upon the ground of the legal right to it in the mortgagee for the purpose of obtaining payment of his debt, even if in such a case it could be admitted, (which it cannot), could not reach beyond the mortgagee himself, and the interests which separately belong to him, in which the dispossessed mortgagor has no concern. From this, therefore, Mrs. Damer can derive no benefit. The actual possession by the mortgagee might have had a different effect, because that would have been consistent with her title, and not adverse to it. And yet even this, the actual possession of the mortgagee continued for twenty years, without any payment of interest by the mortgagor, or any thing done or said during that period, to recognize the existence of the mortgage, or to acknowledge it on the part of the mortgagee, would clearly operate as a bar to redemption by the mortgagor.

[The MASTER OF THE ROLLS, after holding that the analogy to the Statute of Limitations must prevail against the plaintiffs in this case, concluded by saying :]

CHOLMON-
DELEY
v.
CLINTON.

It is upon this ground alone, and I am anxious that it should be distinctly so understood, without resting upon any of the other points in the cause, I think this bill should be dismissed.

[189]

Bill dismissed, without costs.

The decree dismissing the bill having been enrolled, the plaintiffs appealed to the House of Lords. By the directions *of the House, the case was argued with reference to the equitable points only, on the supposition that the construction of the ultimate limitation in the deed of 1787 was in favour of the appellants. On the 15th of June, 1821, judgment was given, affirming the decree, on the ground of the length of time which had elapsed between the entry of the late Lord Clinton and the filing of the bill.

[*190]

[The following passages from the judgments of Lord ELDON, L.C., and Lord REDESDALE, in the House of Lords, are taken from the report of the appeal in 4 Bligh, and are selected as bearing upon the subsidiary points above referred to. In the course of his judgment in the House of Lords upon this appeal, Lord ELDON said :]

We have long laid it down, and I understand it to be still the law of the land, that if I lend my money on a mortgage, and the noble Lord who sits near me afterwards lends his money upon a mortgage of the same estate, having no notice of my mortgage ; if he goes to the trustee of an old term, and gets in that term, having no notice to affect his conscience that I have a mortgage before, although that term was held prior to his getting it in, in trust, first for me, and then for him ; yet his conscience not being barred against the getting in that term, he will protect himself by that term ; *that is, he shifts the equity, which was first in me, into himself, and by his diligence he gets the advantage, which by my negligence I have lost. * * * I would lay out of

1821.

[4 Bligh, 87.]

[*88]

[90]

CHOLMON-
DELEY
v.
CLINTON.

the case the question, whether there are proper parties before the Court for a decree at all in this cause? intimating it as my humble opinion, that it is extremely difficult to answer that question affirmatively.

I will for the present also lay out of the question, whether, by consent of parties at the Bar, a court of justice can overlook the objection which arises upon the policy of the law, where a bill is filed by persons stating such an agreement between themselves, as (intelligibly or unintelligibly stated) is put upon this record, because, if this agreement falls under the censure of the law with respect to dealings as to titles, I do not conceive that it is according to the duty of a court of justice to overlook that objection, even if the parties wished it might be overlooked. I give no opinion at present upon that, neither shall I say that the parties overlook it; but I am anxious to state this, because I think it of public importance, that it should be known that the Court would itself deem it to be an act which its duty required it to do, to take notice of such an objection if it appeared upon the record, whether taken notice of by counsel or not. * * *

[95]

Since our different Statutes of Limitation have passed, I believe I may venture to say, that it has been our endeavour in courts of equity to assimilate our proceedings to those of courts of law, by attending to the Statutes of Limitation, not regarding them merely with reference to the statutes themselves, as they do at law, but also with reference to such circumstances as furnish grounds of presumption, that something may have happened that may be a bar to any claim; and we go much further; for even where the time mentioned in Statutes of Limitation has not run out, where there is no such presumption that there may have happened something which would be a bar to the demand; yet if the demand is made under circumstances of inconvenience to individuals, that would amount to positive oppression, that would break in upon those principles which are established for the peace of all the families, constituting the great family of the public, courts of equity have said, you must go to those courts that were not made for *a righteous man, if there be such courts, you cannot have relief in a court of equity.

[*96]

This being so, unless I misunderstand the law of the country,

there is a vast difference between things to which we give the same denomination, I mean trusts. You have a trust expressed; you have a trust implied; you have relations formed between individuals in the matters in which they deal with each other, in which you can hardly say that one of them is a trustee and the other a *cestui que* trust; and yet you cannot deny, that to some intents and some purposes one is a *cestui que* trust and the other a trustee. Of the latter character, I take a mortgagor and mortgagee to be; and it is not upon this occasion, as it appears to me, necessary to be entering into the arguments about abatement, disseisin, intrusion, and so on, in the case of strict trustee and *cestui que* trust; for in the case of strict trustee and *cestui que* trust, you are to consider not only what was done, but what it was the duty of the person to do. It is the duty of the trustee to take care of the interest of the *cestui que* trust, and there are many cases in which you will not permit that individual to do any thing for his own interest, adverse to the interest of the *cestui que* trust. So a termor has a duty to preserve the interest of his landlord, and there are many acts, therefore, which may be done both by a trustee and a person claiming in the character of a termor for years, which, if they were done by persons standing in other relations, would be acts to be denominated acts of adverse possession; but when the law makes it the duty of a man to abstain from doing those acts, the law will not permit him to *say they are acts of adverse possession, having the effect of acts of adverse possession.

CHOLMON-
DELEY
v.
CLINTON.

[*97]

But how is that between mortgagor and mortgagee? When I become a mortgagee, I am bound in the contract of mortgagor and mortgagee to be content with the payment of the interest, not until it is convenient to the mortgagor to pay me my principal, but until it is convenient to me to receive my principal; and if I demand my principal and interest, and he tenders to me my principal and interest, I am a trustee to convey to him the estate; but I am quite at liberty, after the time is out, during which there is a default, to enter and to receive all the rents and profits; and if I choose not to keep an account, that will not protect me, provided there is not negligence. If I make no acknowledgment to myself or a third person; if I do not declare

CHOLMON-
DELEY
v.
CLINTON.

in my will, or somehow or other, that I am only mortgagee, I may go on receiving the rents and profits; and if the negligence of my mortgagor suffers me to go on twenty years, I may turn round and say, "You shall not have your estate again, I will keep it;" why? because public policy says it should be so.
* * *

[100] Lord Clinton takes an estate with the consent (founded in mistake, if you please,) of Horace Lord Orford, in the year 1791. His taking the estate by that consent does not make the possession of the estate on his part less adverse, because it is a taking of the possession of the estate for himself, where he owed no duty whatever, as it appeared to me, to Horace Lord Orford, and his taking the possession of the estate, and keeping the possession of the estate during all the time in question, is, as it appears to me, an adverse possession of the estate, and intended to be an adverse possession of the estate. The intention on the part of Horace Lord Orford may have been an intention generated in his mind by mistake; but no person can deny that it was his intention that the former Lord Clinton should have a beneficial interest in the property so handed over to him; and if it was his intention that Lord Clinton should have a beneficial interest in the property so handed over to him, it appears to me it must be the intent that he should have an adverse enjoyment.
* * *

[117] All the statutes for the limitation of actions are statutes expressly made for the purpose of quieting possession; that is the great object of the policy of those statutes. It is generally immaterial to the public at large, whether A. or B. is the owner of a particular estate; but it is highly important to the public at large, that the person who is in possession should be the owner, for he is dealt with by all men as the owner, they seeing that he is in possession, and therefore it is a consideration of public policy. The Statutes of Limitation are not simply for the purpose of quieting rights between individuals, but they are founded upon public policy, that the person who is in possession having the credit attributed to that possession, his possession should not be lightly disturbed. * * *

[123] The next consideration is with respect to the frame of this

CHOLMON-
DELEY
v.
CLINTON.

bill ; and it is utterly impossible that any decree could be made upon this bill, because the persons who are co-plaintiffs in this bill have opposite interests. If the estate passed by the will of Horace Earl of Orford, Lord Cholmondeley has nothing to do with it ; if it did not pass by the will of Horace Earl of Orford, Mrs. Damer has nothing to do with it. Then in what manner would this question arise ? If there was no other objection to it, there might be a bill filed by Mrs. Damer, and another by Lord Cholmondeley ; and to the bill filed by Mrs. Damer, Lord Cholmondeley must be a party ; and to the bill filed by Lord Cholmondeley, Mrs. Damer must be a party ; and the Court must decree, that Mrs. Damer had no right, in one instance, and Lord Cholmondeley in another ; and, how is this sought to be avoided ? By an alleged agreement, and that is directly contrary to law. They are both of them out of possession, and are incompetent to make a bargain upon the subject, affecting any person, except the person in possession ; they are both competent to make a composition with him, if he thought fit, but competent to deal with no other person by the statute, which is only an affirmance of the common law upon the subject of pretended titles, by adding penalties. By that statute, this agreement is not only contrary to law, but would make the persons who entered into it, liable to heavy penalties.

It is, therefore, impossible for any decree to be made here ; you could not make a decree, if nothing was stated, as to the agreement, because the relation of parties would be inconsistent with the decree. You cannot make a decree at the suit of A. and B. which is to destroy the right of A. and give the right to B. ; or give the right to A. and destroy the right of B. : it is utterly inconsistent. To avoid that inconsistency, they state this agreement, which is contrary to law, and which you are bound to destroy. Nothing can be more dangerous than such contracts ; and the act against pretended titles, was as much to protect possession, as the Statute of Limitations ; the great object of the law, the policy of the law throughout, has been to protect possession.

[124]

[A short note of this appeal will be found ante, p. 83.]

1820.

May 1, 8.

Rolls Court.
LORD CHIEF
BARON,
and Masters
COURTENAY
and

DOWDES-
WELL,
for
PLUMER,
M.R.

[207]

PENTICOST v. LEY.

(2 Jacob & Walker, 207—211.)

Bequest of 1,000*l.* long annuities “now standing in my name or in trust for me.” At the date of the will, the testatrix had no long annuities, but had, 1,000*l.* 3 per cent. reduced annuities. Held, that that sum passed by bequest.

ALICIA DONKIN, by her will, dated the 18th November, 1802, amongst other things, gave to William Ley, son of Halse Ley of Totnes, in the county of Devon, 700*l.* part of the sum of 1,000*l.* long annuities then standing in her name, or in trust for her; she also gave to Halse Ley, another son of the said Halse Ley, the sum of 200*l.* other part of her capital or share in the long annuities; and she also gave to Mary Penticost, the daughter of Sarah Penticost, the sum of 100*l.* the residue of the said sum of 1,000*l.* long annuities. She appointed Jacob Ley her executor, and gave to him the residue of her real and personal estate.

[208]

The testatrix afterwards, by a codicil, revoked the bequest to William Ley, and divided the 700*l.* given to him by the will into parts as follows, viz.: 300*l.* to his brother, Halse Ley; 200*l.* to his brother, Thomas Ley; 100*l.* to his sister, Elizabeth Harris; and the remaining 100*l.* on the decease of William Ley's wife, to be paid to him. The testatrix died in June, 1812.

The bill was filed by the legatees against the executor, for payment of their legacies. By the answer of the defendant it appeared, that the testatrix, at the time of making her will, was entitled to a sum of 1,000*l.* 3 per cent. reduced annuities, and a sum of 3,738*l.* 13*s.* 10*d.* 3 per cent. consolidated annuities, standing in the names of trustees for her. These sums had been afterwards, by an order of the Court, transferred into the name of the Accountant-General, and remained standing in his name until the death of the testatrix; they were subsequently transferred to her executor. On inquiry at the Bank, it appeared that the testatrix had no long annuities standing in her name at the time of her death, and no information could be obtained as to any long annuities having ever belonged to her. The question was, whether the plaintiffs, the legatees of the 1,000*l.* long

annuities, were entitled to any thing, and what, in respect of the bequests to them? PENTICOST
v.
LEY.

Mr. Heald and Mr. Pepys, for the plaintiff, [cited *Selwood v. Midmay*,† and other cases there referred to, including a case of *Dobson v. Waterman*, in which Lord Kenyon (in 1786) held that a legacy of 700*l.* 3 per cent. consolidated bank annuities, described as then standing in the name of the testator, must be satisfied out of 3 per cent. South Sea annuities on proof that he had no other 3 per cent. annuities except the South Sea annuities standing in his name at the date of his will or at his death.]

Mr. Horne and Mr. Boteler, for the defendant, the executor. [210]

* * *

The LORD CHIEF BARON, observing that it was not distinctly admitted in the answer that the testatrix had no long annuities at the date of her will, enquired if the defendant was willing to admit it, or would prefer an inquiry. May 8.

The defendant's counsel consented to admit the fact.

THE LORD CHIEF BARON (after stating the will) :

The question in this case is, whether the plaintiffs take any thing, and what, by the bequests to them? If the testatrix had had any long annuities at the time of making her will, and had afterwards disposed of them, there might have been a question of revocation or ademption; but we now may understand that she had none; and that being the case, I take it for granted, that she could not really have intended to bequeath long annuities, specifically so called. But it is clear she meant to give something, and unless we can travel from what she has said to something else, we must entirely disappoint that intention.

It being clear that she intended to give something, *we must try, as well as we can, to make out what it was. Now she had, at the date of her will, a sum of 1,000*l.* 3 per cent. reduced annuities; and having nothing to answer the description so nearly as that sum, and it being clearly a mistake, it seems to [*211]

† 4 R. R. 1 (3 Ves. 306).

PENTICOST
v.
LEY.

me that we are obliged to consider, that when she said 1,000*l.* long annuities she meant this 1,000*l.* 3 per cent. reduced annuities.

We are fortified in this conclusion, and, as it were, driven to it, by that case of *Dobson v. Waterman*. One of my learned friends has searched the Register's book,[†] and finds that it is correctly stated. That case decides this. I can see no rational distinction between them. There is also another case which has been pointed out by one of my learned friends, *Door v. Geary*,[‡] decided by Lord HARDWICKE, and which establishes the same principle.

We are therefore all of opinion, that there must be a declaration of the Court, that these legacies were intended to be given out of the sum of 1,000*l.* 3 per cents. which the testatrix then had standing in trust for her.

1820.
Nov. 2.

WORRALL v. JOHNSON.§

(2 Jacob & Walker, 214—219.)

Rolls Court.
PLUMER,
M.R.
[214]

The general lien for professional charges which a solicitor has upon his client's documents deposited with or held by him as solicitor, applies to money secured by those documents, and is not defeated or impaired by the payment of the money into Court in proceedings taken on behalf of the client for its recovery.

A solicitor's lien does not extend to debts that are not due to him in his professional character.

EDWARD ALLEN being indebted to the plaintiffs, by deed assigned to them as a security, his share in the capital and stock of a partnership in which he was engaged with two of the defendants. He afterwards became bankrupt; upon which the suit was instituted against his partner and his assignees, for the recovery of the property assigned; and a balance admitted to be due to Allen from his partners was, on motion, paid into Court and invested in the purchase of 2,330*l.* 3 per cent. consols. The suit was afterwards compromised, and one of the terms agreed

[†] Reg. Lib. A. 1786, fol. 268.

[‡] 1 Ves. sen. 255.

§ *In re Taylor & Co.*, '91, 1 Ch. 590, 60 L. J. Ch. 525. A solicitor's lien upon "property recovered or preserved" through his instrumentality by litigation is limited

under 23 & 24 Vict. c. 127, s. 28, to costs in reference to such litigation: *Emden v. Carte* (1881) 19 Ch. Div. 311, 51 L. J. Ch. 371. The same limitation was imposed before this statutory remedy was given: *Bozon v. Bolland* (1839) 4 Myl. & Cr. 354.

WORRALL
v.
JOHNSON.

upon was that the plaintiffs were to receive this fund. Before a transfer took place, the plaintiffs became bankrupts, and their solicitors then presented a petition for the purpose of establishing their lien on the 2,330*l.* consols, for the payment of their bills for costs incurred in the suit, and for the costs of other professional business in which they had been engaged for the plaintiffs. Their claim was referred to the Master, who reported in favour of it. By the report it appeared that the deed of assignment from Allen to the plaintiffs had been deposited with the solicitors, who had also in their hands the memorandum of the agreement between the plaintiffs and defendants. They stated by their affidavit that they had expended considerable sums of money in this suit and in other suits and matters on behalf of the *plaintiffs, and that they had forborne to enforce payment of their bills, upon the faith of, and trusting to the result of this suit, and relying on the fund in Court, and their lien on the deed of assignment, and the agreement.

[*215]

A petition was now presented to confirm the report, and a counter-petition by the assignees of the plaintiffs praying that it might be reviewed, and that the lien might be declared to extend only to the costs of the suit.

Mr. Wetherell and *Mr. Wilbraham*, for the plaintiffs' assignees. * * *

Mr. Horne and *Mr. Romilly*, for the solicitors. * * *

[216]

THE MASTER OF THE ROLLS:

[218]

If this case depended on the general question, to what extent a fund in Court is liable to the solicitor's demands, I should pause before I decided; but it is to be considered whether this is not a special case, standing on grounds independent of the general principles that have been discussed.

There are two kinds of lien that a solicitor has for his bill of costs; one on the funds recovered, and the other on the papers in his hands. If there be no fund and no cause, still the client cannot get back the papers without paying what is due, not only in respect of that business for which the papers were used, but for other business also. This lien, however, does not extend to

WORRELL
v.
JOHNSON.

general debts, but only to what is due to him in the character of attorney. That he has a right to retain, and it is in consequence the general practice for the client when he applies for an order for the delivery of his papers, to submit to pay the bills of costs generally.

[*219] In this case, the mortgage deed on which the money recovered was due was put into the hands of the solicitor. Suppose there had been no suit; then the money could not have been received without giving up the deed; for the mortgagor would not have paid it without having the deed back. In that case the attorney would get all that was due to him; for it is allowed that his lien on the deed is general. Whether the money is paid with or without a suit can make no difference, the attorney having, on the faith of the instrument, and of the money *due on it, engaged in various business, and forborne proceedings to enforce payment. The circumstance of the suit being carried on to compromise, to a judgment, or a decree, cannot deprive him of the lien that he has by virtue of the possession of the deed. If the Court were to decide that it did, it would give the attorney an interest to be negligent in the conduct of the cause. While the deed remained in his hands he would have a lien for his whole demand; but his industry, employed in the service of his client, would abridge this general right. His final success cannot be allowed to operate to his prejudice.

It is of no consequence that there has been a compromise here. The fund cannot be transferred without an application to the Court; and the other party would then object, unless the deed be given back to them; and it cannot be got at except from the solicitor. The plaintiff's assignees can therefore never succeed without applying for the possession of it. The same question would therefore ultimately arise in another shape. The rights of the parties are not altered by the money being paid into Court; the accident of where it may be is immaterial, so long as it is *in transitu*.

The principle I go on is, that the papers which give to the solicitor this right must be considered as giving the same right, after the suit has been prosecuted with success, as when they were antecedently in his hands. To decide otherwise would be

extremely mischievous, in discouraging a solicitor's exertions for his client. This does not involve the general question. The money here is the fruit of this deed, and it can only be recovered through the medium of the deed. I therefore think the decision of the Master right.

WORRALL
v.
JOHNSON.

BOEHM v. WOOD.

(2 Jacob & Walker, 236—237.)

1820.
Nov. 25.

Lord
ELDON, L.C.

A receiver appointed on the motion of the vendor, pending a reference of title.

[236]

THIS was a motion for the appointment of a receiver, pending a reference of title, in a suit for the specific performance of a contract for the sale of certain estates.†

Mr. Hart and *Mr. Stephen*, for the plaintiff, the vendor, in support of the motion, stated, that the Court had made orders similar to that sought by the present *motion, where each party wished to divest himself of the possession of the property. The appointment of a receiver was particularly called for in the present case, as the property consisted of buildings and offices on which it would be necessary to effect insurances, and of ornamental grounds which required considerable expenditure and attention. All the defendant's objections to the title had been answered, but some time must elapse before the cause could be heard.

[*237]

Mr. Shadwell opposed the motion, observing, that all the objections to the title were not removed, and that the expense of a receiver, if one was appointed, ought to be borne by the vendor, whose duty it was to have his title ready.

THE LORD CHANCELLOR :

The proper order to be made is, that a receiver should be appointed, reserving the consideration of the question, at whose expense it should be.

† The circumstances under which the suit was instituted are stated 1 J. & W. 419; see 21 R. R. 213.

1820.
Nov. 25.
Dec. 6.

Lord
ELDON, L.C.

[245]

FOLEY v. WONTNER.

(2 Jacob & Walker, 245—248.)

Jurisdiction for the execution of a trust for supporting a dissenting meeting-house, difficult to exercise.

Pending a suit for the regulation of a dissenting meeting-house, the minister, if performing his duty, will in general be continued, whether duly appointed or not.

A dissenting meeting-house must continue devoted to the doctrines originally agreed on at the foundation of the trust, though some of the congregation may change their opinions.

THIS was a bill by some members of a dissenting meeting-house against the trustees and committees, for a general regulation of its affairs, according to a trust deed executed in May, 1796, at the time of its original erection. In the year 1803, the ground on which the meeting-house stood being required for the purposes of the London Dock Act, a new meeting-house was built on another spot, and on that occasion, a new trust deed was executed, differing from the former, by transferring the power of filling up the vacancies amongst the trustees and committees, from the congregation at large, to the surviving trustees and committees. This alteration was alleged to be conformable to the original resolutions of the congregation, in 1796, from which the deed then executed had in that particular deviated. There were to be five committees and thirteen trustees, in whom the *legal estate was vested; and, from time to time, on the appointment of new trustees, proper assignments were to be made. It appeared that various disputes had arisen.

On the filing of the bill, an injunction had been obtained, to restrain the defendants from shutting the chapel, or excluding any of the congregation. A motion was now made to dissolve the injunction; and a cross motion was made, at the same time, for the appointment of a receiver.

Mr. Hart and *Mr. Simpkinson*, for the plaintiffs.

Mr. Agar and *Mr. J. Martin*, for the defendants.

THE LORD CHANCELLOR said, he had several times been called upon to execute trusts, with respect to these dissenting meeting-

[*246]

houses, held under trust deeds ; but what the Court could do in such cases was very little. Considering their number, it was much to the credit of dissenters that their affairs were not more frequently made the subjects of suits ; when they had been, he had never known any good result from it.

FOLEY
v.
WONTNER.

If this stands on the first deed only, and was the case of any other trust, it seems to me, that if they have not filled up the whole number of trustees and committees, the power of the remainder is gone. The deed is on the principle which, I believe, governs most dissenting congregations, that the trustees and minister are to be elected ; and it provides that due assignments are to be made from time to time. These persons cannot associate others with them to act as trustees ; they must be trustees or nothing. In such a case, unless it differs from all other trusts, the Court would fill up the number, referring it to the Master to appoint proper persons, and when appointed, would direct them to carry on the trusts of the *deed. Having neglected to fill up the vacancies, there is no one now who has any power. I apprehend neither the congregation nor any one else can fill them up : it must be done by the Court.

[*247]

With respect to the minister, the practice of the Court, in these cases, is, if they find a minister in possession, and ministering in the way in which it was the meaning of the congregation that he should, preaching the doctrines that were intended, to continue him in the mean time, whether he was duly appointed or not ; for the first point is to have the service performed ; and the Court will pay him his salary.

One of the most difficult questions in these cases is, what is to be the course when the doctrines, which it was originally matter of agreement should be inculcated, are not adhered to by all the congregation ; some of them having changed their religious opinions. I take it to be now settled by a case in the House of Lords, on appeal from Scotland, that the chapel must remain devoted to the doctrines originally agreed on. I think I acted on that in the case of a chapel in Worcestershire.†

His Lordship desired the motions to stand over till the next

† See *Attorney-General v. Pearson*, 17 R. R. 100 (3 Mer. 353).

FOLEY seal, and strongly recommended the parties to come to some
v.
WONTNER. arrangement in the mean time.

Dec. 6. The motions were brought on again ; no arrangement having been effected.

THE LORD CHANCELLOR :

[*248] If the parties cannot agree as to the trusts on which *the meeting-house is now held, I must refer it to the Master to inquire what the trusts are, and in the mean time enjoin all parties from doing any thing to disturb the state of things now existing. The appointments of trustees are nothing, and the persons are no trustees till they can join in all the acts, that form the duty of the trustees. It will be much better, if they can, to settle it out of Court ; if they cannot before Saturday, I will dispose of the motion ; but I do not at present see my way to any thing but sending it to the Master. I am almost afraid that I am doing what may subvert the peace of many religious societies, in shewing the infirmities of the law on this subject.

A reference to arbitration was afterwards agreed to.†

1820.

Dec. 2, 4.

GOODMAN v. SAYERS.

(2 Jacob & Walker, 249—264.)

Rolls Court.
PLUMER,
M.R.

A bill will not lie to set aside an award on a question of fact referred to arbitration, except for corruption, partiality, or irregularity of conduct in the arbitrators.

[249]

There is no remedy in equity for the recovery of money paid on compromise of an action, where the party had full knowledge of the facts, and the means of proving them at the trial.

On a bill to impeach an award, evidence of the merits is only to be received so far as it throws light on the conduct of the arbitrators.

It is irregular for two arbitrators to meet without notice to the third ; but it is not a sufficient ground to set aside the award, when the substance was settled in his presence. *Semble.*

[THIS case turned upon special circumstances, and is merely noted for the sake of keeping some general observations of the

† Reg. Lib. A. 1820, fol. 538.

MASTER OF THE ROLLS upon the question of setting aside awards.

GOODMAN
v.
SAYERS.

The plaintiff sought to set aside an award and to recover money which he had paid to compromise an action brought against him in the award.

The MASTER OF THE ROLLS decided that the plaintiff was precluded from seeking relief by having compromised the action with a full knowledge of all the facts and circumstances and alleged irregularities affecting the award.

In the course of his judgment the MASTER OF THE ROLLS said :]

[259]

* * No bill in equity will lie to set aside an award, on a question of fact, within the province of the arbitrators, and decided by them. They are the judges chosen by the parties, and no court of law or equity has any cognizance of the matter, by way of appeal from their decision : the consequences of such a jurisdiction would be most mischievous : for the very definition of a good award is, that it gives dissatisfaction to both parties, and the result therefore would be, that applications of this kind would be continually made upon frivolous grounds. In letting in evidence of the merits, I never permitted it for the purpose of shewing what the merits were ; and I consider it myself, only so far as it may tend to prove such a case of misconduct, on the part of the arbitrators, as would give this Court jurisdiction. * * *

Their decision must be final and conclusive, unless the plaintiff can fix upon them corruption, partiality, misconduct, or irregularity. The onus of proving that lies upon him. * * *

[260]

The strongest circumstance is the irregularity in not citing Hobbs† when they met to sign their award ; and it certainly is true, that if two arbitrators out of three meet alone, excluding the third, or not giving him notice ; and if they receive evidence, or hear discussions, without him, their proceeding is irregular. When the matter is referred to three, the arguments and the judgment of all three should be had recourse to in every stage. The cases referred to, on the part of the plaintiff, were instances of fraudulent contrivance to exclude the third ; but, at all events,

[261]

† One of the three arbitrators appointed to settle the matter in dispute.

GOODMAN
v.
SAYERS.

[*262]

it is irregular not to give him notice. Here, however, all the evidence was heard, and all the substance of the business was settled in his presence; *the rest, the signing the award, was a mere form; this they thought they were at liberty to do by themselves; they did not however act secretly, but determined in the manner in which they had previously informed him that they should. Then should the Court set aside the award on account of the absence of one arbitrator under these circumstances? The cases have never gone to that length. * * *

[His Honour then held that the plaintiff's compromise of the action on the award precluded all questions, and he concluded by saying:]

[264]

I think, that on the ground of jurisdiction, the Court is precluded from enquiring into the merits. If there was any irregularity in their proceedings, it was too late to institute a suit after payment of the demand.

*The bill must therefore be dismissed, and, I think,
with costs.*

* * * * *

—•—

1820.
Dec. 5.

Lord
ELDON, L.C.
[264]

VANSANDAU v. ROSE.†

(2 Jacob & Walker, 264—266.)

A defendant committed for breach of an injunction after notice of its having been obtained, although the order for the injunction had not been served.

THIS was a motion (of which notice had been personally served) that the defendant might stand committed for breach of an injunction.

The injunction was obtained by the plaintiff to restrain the defendant, his tenant, from cutting down timber on the farm, and carrying away that which was already cut. It appeared by affidavit, that notice of the order for the injunction was personally served on the defendant the morning after it was obtained, and a full explanation of the effect of it was verbally given at the same time, and that the defendant had since cut down timber,

† *United Telephone Co. v. Dale* (1884) 25 Ch. D. 778, 53 L. J. Ch. 295.

and carried away that which had been already cut, and had also grubbed up hedges, and was in a state of insolvency.

VANSANDAU
v.
ROSE.

Mr. Knight, in support of the motion, stated these circumstances, and also mentioned, that he had made it before the Vice-Chancellor, and had cited the case of *Kimpton v. Eve*,† but that his Honour declined to make any order. [265]

THE LORD CHANCELLOR :

Many of the circumstances which you mention go to shew the propriety of granting the injunction : the next question is, what is the Court to do where notice of it has been given which is not accompanied by service of the injunction itself ? It was held by Lord HARDWICKE, over and over again, that if the person against whom the injunction is granted, is in Court at the time, that is notice enough ; and, in a subsequent case, it was held, though I forget by whom, that if the party is on the outside of the Court, and he is informed by somebody who is in the inside, that it is granted, that was sufficient notice. It appeared to me, after having much considered this subject in the case to which you allude, that in many cases all the mischief would be done, and that you might as well grant no injunction at all, unless notice of it was held sufficient ; and that the point was of great importance with reference to applications for injunctions during the long vacation, when the course is to serve the party with notice only, the injunction not being engrossed, or sealed, or brought to be sealed.

It also appeared to me, that the responsibility which a solicitor is under with respect to his duty to this Court, and his liability to be struck off the rolls, and to be indicted for perjury, were as good a security as you could have against the abuse of the practice. In this case, if the warrant of committal is sent to me, I think that I shall not hesitate to sign it. What I have now stated must be subject to this observation, that there has been *no delay in endeavouring to get the order drawn up, and the injunction under seal, and serving it when obtained.† [*266]

† 13 R. R. 116 (2 V. & B. 349).

† Reg. Lib. B. 1820, fol. 66.

1820.
Nov. 28.
Dec. 5.

Lord
ELDON, L.C.

[266]

MARSHALL v. COLMAN.

(2 Jacob & Walker, 266—269.)

An injunction will not be granted to restrain the breach of a covenant in articles of partnership which has not been infringed for any length of time, where the bill does not pray a dissolution of the partnership.

Whether the Court will in any case grant such an injunction, unless there is ground for, and the bill prays a dissolution of the partnership.

Quære.†

IN the month of September, 1818, articles of partnership were entered into between the plaintiff and defendants, by which it was agreed (amongst other things) that their business, that of wholesale linen-drappers, should be carried on in the name or firm of Colman, Willett, Oxley, and Marshall; and that all contracts and engagements entered into by any of the parties, on account of the said trade, and all cheques and drafts drawn by them, and all receipts for money paid, on account of the said trade, should be in the joint names of the said John Morris Colman, Henry Willett, James Oxley, and John Marshall.

The bill, filed in July, 1820, alleged that the defendants, Colman and Willett, had entered into numerous contracts and engagements, and written numerous letters (under some of which goods had been supplied and delivered) in the name of Colman, Willett & Co., and had refused to add the name of the plaintiff, or to comply with the above-mentioned covenants; thus preventing him from being known as a partner, and from receiving partnership debts, and that Oxley consented thereto: and it prayed that the two first-named defendants might be restrained, by injunction, from carrying on the trade or entering into any contracts, &c. (pursuing the words of the covenant in the partnership articles) except in the *joint names of J. M. Colman, H. Willett, J. Oxley, and the plaintiff.

[*267]

The defendants, by their answer, admitted that Colman and Willett had written numerous letters relating to the partnership business, and believed that some receipts for money might have

† “ Whatever doubt there may formerly have been upon the subject, it is clear that an injunction will not be refused simply because no dissolution

of partnership is sought:” Lindley on Partnership, 6th ed. 525, where later authorities are collected.—F. P.

MARSHALL
v.
COLMAN.

been given in the names of Colman, Willett, & Co. and sometimes in the name of Colman & Co. on account of the great inconvenience of writing four names at length; and insisted that it was a very common practice in partnerships where the parties are numerous. They stated that over their houses of business, in their bills of parcels, and in all bills of exchange drawn or accepted by the partnership, the names of all the four partners were written at length; and denied that they had drawn any draft or cheque, except in those names; and they believed that no contract could be completed without its being known, and that in fact it was well known to all persons dealing with the partnership, that the plaintiff was a partner. They admitted that about April last the plaintiff had applied to them to use his name in their letters of business, and stated they had then informed him of the inconvenience of using four names. It was also sworn, that the plaintiff had written letters and given receipts for the partnership in his own name, generally adding for "self and partners."

Mr. Wetherell and Mr. West moved for an injunction.

Mr. Hart and Mr. Bickersteth, *contrà*.

THE LORD CHANCELLOR :

There is only this point in the case now before me, which I wish seriously to consider, viz. that although *this Court will interfere where there is a breach of covenants in articles of partnership, so important in its consequences as to authorise the party complaining to call for a dissolution of the partnership, whether (and it is a matter that will deserve a great deal of consideration before it goes so far) it will entertain the jurisdiction of pronouncing a decree (for this is what is to be done in the cause in which this motion is now made) for a perpetual injunction, as to a particular covenant, the partnership not being dissolved by the Court. There is one case which is constantly occurring, that of a partner raising money for his private use on the credit of the partnership firm; and the Court interferes then, because there is a ground for dissolving the partnership; but then the danger must be such, there must be that abuse of good

[*268]

MARSHALL
v.
COLMAN.

faith between the members of the partnership, that the Court will try the question, whether the partnership should not be dissolved in consequence. But it is quite a different thing, and it would be quite a new head of equity for the Court to interfere where one party violates a particular covenant, and the other party does not choose to put an end to the partnership: in that way there may be a separate suit and a perpetual injunction in respect of each covenant; † that is, a jurisdiction that we have never decidedly entertained. All this bill seeks is, a perpetual injunction against using any other than this particular firm and name; and the question would be, if very serious mischief were to arise from not using it, whether the party would not be obliged to frame his bill differently. I have no difficulty in saying, that where the members of a partnership contract by covenant, that the firm shall be A. B. C. and D., that it is a breach of that covenant for A. to sign those instruments to which *the covenant refers, in the name of A. & Co.; but it is no less a breach of that covenant for D. to sign his own name, adding “for self and partners,” because by these words it can no more be known who are his partners, than by the word Co.

[*269]

When partners enter into such contracts, the meaning and intent is, that, in the first place, it may be known to the world, for the benefit of each partner, that he is a partner in that concern, and also that, as between each partner and the world it should not be left to them to speculate who are really partners, or who are dormant partners, and so on: it is intended, that each individual may have the credit which belongs to his name, and may not be exposed to consequences which might arise from his name not being used. But it must be made out to be a case which goes further than this does, to entitle the Court to grant an injunction against the breach of such a contract; it must be a studied, intentional, prolonged, and continued inattention to the application of one party calling upon the other to observe that contract. Looking at the circumstances of this case altogether, recollecting that the application was only made by

† See *Forman v. Homfray*, 13 R. R. 115 (2 V. & B. 329); *Harrison v. Armitage*, 20 R. R. 244 (4 Madd. 143). *Waters v. Taylor*, 13 R. R. 91 (15 Ves. 10).—O. A. S.

the plaintiff in April last, and even admitting that some of the letters, as has been insisted, may amount to contracts binding on the plaintiff, the question is, whether it was not known who were really partners? I do not mean to say that there has been such an exact performance of the contract as there ought to be, and these gentlemen will do well (if they mean to protect themselves from the interference of this Court) to use all the names in the concern,—they must do that, or the Court will be under the necessity of awarding an injunction, or dissolving the partnership.

MARSHALL
v.
COLMAN.

Motion refused without costs.

THE ATTORNEY-GENERAL v. HINXMAN.†

(2 Jacob & Walker, 270—278.)

1820.
Dec. 4, 6.

Devise of a house after the death of A., for the use of the master that might be appointed to a school for the instruction of poor persons in W., and a bequest of money upon trust to apply the interest in procuring a master and mistress for instructing poor children, and in keeping the school-house in repair, and to apply the residue of the interest to the poor.

Rolls Court.
PLUMER,
M.R.

[270]

Held: that the bequest to the school was void as being connected with the devise of the house; and the amount intended for that purpose being uncertain, the gift of the residue was also void.

If an undefined proportion of a legacy is to be applied to a purpose void by the Statute of Mortmain, it vitiates the whole.

When the fund is applicable at discretion to several purposes, some of which are void and the others not, it will be confined to the latter.

Gift of the residue of a fund after the application of an undefined amount to a void charity, is void for uncertainty.

JAMES HINXMAN, by his will, dated in January, 1814, devised his messuage, or tenement and house, called late Walldings, to Martha Brown, for her life, if she should so long continue unmarried, and after her decease or marriage, he devised the said messuage or tenement and house to his executors, in trust, that the same might be appropriated to the use of the master that might be appointed to a school, for the instruction of poor persons belonging to the parish of Week, for so long a time as his interest therein should continue. He desired his executors, out

† As to the effect of such a devise where the testator dies after the 5th August, 1891, see the Mortmain and

Charitable Uses Act, 1891, ss. 5 and 8: *In re Bridger*, '94, 1 Ch. 297, 7 R. 78, 63 L. J. Ch. 186.—O. A. S.

ATT.-GEN.
HINKMAN.

of his personal estate, to put this house into decent and habitable repair ; and, till that was done, Martha Brown was to be permitted to reside in the house in which he then lived. The will contained, in a subsequent part, the following clause :

“ And I do desire and direct, that my executors, hereinafter named, shall lay apart, from my personal estate, the sum of 2,000*l.*, and invest the same in the purchase of stock, in the name of the minister, churchwardens, and overseers of the poor of the parish of Week aforesaid, upon trust, that they, the said minister, churchwardens, and overseers, do pay and apply the interest, dividends, and produce of so much thereof, as they may think necessary, in procuring a master and mistress, for instructing poor children in reading, writing, and needle-work, and bringing them up in the principles of the established church, and keeping the school-house in decent repair. And upon this further trust, that they do pay, apply, and distribute, the residue, if any, of the said interest, and *produce, after payment of the expenses of the said school, as aforesaid, unto and amongst such poor families and persons, parishioners of, and resident in Week aforesaid, at such times, and in such proportions, as the said minister, churchwardens, and overseers shall think proper.”

[*271]

By a codicil, alluding to the will, as “ minutes of instructions in writing for his will,” he gave the residue of his estate and effects to H. S. D. King, and he gave to his executors, the sum of 1,000*l.* in aid of the sum of 2,000*l.* he had directed to be appropriated for the endowment or purposes of a school for children, in manner in such minutes mentioned.

The house called Walldings was of copyhold tenure, held for three lives, and the testator had, previously to making his will, by deed dated in June, 1811, covenanted to surrender it to the use of H. S. D. King, his heirs and assigns, upon trust, for himself for his life, and after his death, to the proper use of H. S. D. King, for his life and the lives for which it was held ; King, by the same deed, covenanting to devote his time to the management of the testator's business. The testator surrendered the house pursuant to his covenant, the surrender being, as it was stated, subsequent to the date of his will. He died in 1814, and King was soon afterwards admitted. The present information

was filed to have the 3,000*l.* legacy applied to the charitable purposes directed in the will. ATT.-GEN.
T.
HINXMAN.

Mr. Heald and *Mr. Lovat*, for the relators, [cited *Attorney-General v. Parsons*.†]

Mr. S. F. Cooke, for the executors, mentioned the *Attorney-General v. Stepney*.‡ * * * [272]

Mr. Sugden and *Mr. Moore*, for the defendant King, [cited *Chapman v. Brown*,§ and *Attorney-General v. Davies*,|| and other cases].

Mr. Heald in reply. * * *

THE MASTER OF THE ROLLS :

[275]

The object of this information is to obtain the declaration of the Court, that the bequests of 2,000*l.* by this will, and 1,000*l.* by the codicil, to charitable purposes, are good and valid, and a reference to approve a plan for their application.

The question may be considered rather as one of construction, than as involving any controverted point of law ; for it is admitted, that if the legacy be inseparably connected with the primary gift, which is a devise of land, and therefore void by the Statute of Mortmain, the legacy must also fail ; on the other hand, it cannot be denied, that if we could, in any way, separate the bequest from the devise, it might stand. This, I think, is the fair result of the argument on the law ; and, taking that to be settled, we have to consider whether this is a connected or a separate bequest in favour of a charity ; and though the Court would certainly feel a strong disposition to effectuate the purposes of the testator, yet, I do not know that it is inclined to refuse to parties the benefit of the statute ; for we must remember that it is the policy of the law which prevents these applications of property : it is a question between the statute on the one side, and the charitable design of the testator on the other.

The testator, after the death or marriage of Martha Brown, gives the house called Walldings to his executors, in trust, to be

† 7 R. R. 22 (8 Ves. 186).

§ 5 R. R. 351 (6 Ves. 404).

‡ 7 R. R. 325 (10 Ves. 22).

|| 7 R. R. 295 (9 Ves. 535).

ATT.-GEN.
HINXMAN.

[*276]

appropriated to the use of the schoolmaster that may be appointed. This is a disposition of the remainder expectant on the determination of the life estate, under which the master would be entitled to call *for the benefit and enjoyment of the house. It was given for so long a time as his interest should continue ; it seems that it was a copyhold for lives, and I suppose might be renewed ; thus it was to be permanently devoted to the use of the master. That devise is undoubtedly bad ; whether it was or was not revoked, on the face of the will, it is bad.

[*277]

It is said that what follows is distinct. It is a pecuniary gift for the general purpose of supporting a school ; and the testator directs the application of the interest, without an apportionment of it, partly to procure a master and mistress, and partly to keep the school-house in repair. Upon this the question arises, what school-house does he mean ? * * The natural construction is, that he means the house, which is the subject of the first devise, to be appropriated to the use of the master ; that house, it seems, was out of repair at the time, and afterwards it must necessarily require more repairs, for which he has thus provided. Part of this fund is to be appropriated to the master and mistress, and some undefined part is to be applied to the house ; that being the case, it cannot be disputed, that the legacy *is so connected with the primary gift, that it must fail. It was a very fair observation that the school was to commence immediately, though the house would not come to the use of the master, till the determination of the tenancy for life ; but that will not relieve the case from the objection, that part of the money is to be employed upon the house. If any part, in any event, is to be applied to an illegal purpose, it vitiates the whole. We cannot here separate it, as in *Attorney-General v. Parsons* ;† there the bequest was for rebuilding, repairing, altering, or adding to the almshouses ; the word or, giving a discretion to employ it in either way, and the LORD CHANCELLOR thought that he was at liberty to confine it to the former alternative alone. But it is quite different here ; no such discretion is given ; the trustees would be bound, if the house was out of repair, to appropriate part of the fund to it. Then how much was to be thus applied ?

† 7 R. R. 22.

ATT.-GEN.
HINXMAN.

I should be very glad if, though that sum is unliquidated and unascertained, the subsequent bequest of the residue could take effect; but the authorities shew, that when the first gift is to a void charity, and the quantity is undefined, the bequest of the residue fails. In *Attorney-General v. Davies*,† the LORD CHANCELLOR says, “It is a bequest of a residue, to be laid out in the first instance in land; and if all should not be exhausted, as it could not be consistently with his scheme, to be laid out upon these purposes, affording medical assistance, and for a chaplain in the almshouses; and all beyond that, if well given, is uncertainly given; and if the primary gift fails, the secondary gift being totally uncertain and fluctuating from time to time, the whole must fail.” In *Chapman v. Brown*,‡ the same point is thus put by the MASTER OF THE ROLLS: “If it could have been reduced to any certainty, how much would have been employed *by the executors for the other purposes, the residue ought to be employed under this last direction, viz. for charitable purposes generally. I have considered whether that can be ascertained by a reference to the Master to see how much would have been sufficient for this chapel; but, upon consideration, it is quite impossible to give any directions that would not be vague and indefinite to a degree almost ridiculous; an inquiry what they might have employed for building a chapel, without knowing what kind of chapel; the testatrix having given no ground to ascertain what kind of chapel; no locality. It is impossible to frame any direction that would enable the Master to form any idea upon it. If she had even pointed out any particular place, that might have furnished some ground of enquiry as to what size would be sufficient for the congregation to be expected there; but this is so entirely indefinite, that it is quite uncertain what the residue would have been; and, therefore, it is void for uncertainty.”

[*278]

On these grounds, I think that the bequest for the benefit of the school is so connected with the primary gift, that it falls to the ground; and the amount to be thus appropriated being unascertained, the gift of the residue, which depends on that, is also void. * * *

† 7 R. R. 295.

‡ 5 R. R. 351.

1820.
Dec. 8.

WHITTELL v. DUDIN.†

(2 Jacob & Walker, 279—286.)

Rolls Court.

PLUMER,
M.R.

[279]

Gift of residue to be equally divided between the testator's wife, sons and daughters; subject nevertheless as to the shares of the daughters, which were to be placed in the funds in the names of trustees; the interest to be paid to them for their lives for their separate use, and after their deaths the testator gave the shares, to the interest of which his daughters should have been entitled for life, to their children equally, with benefit of survivorship. Two of the daughters having survived the testator, died without children. Held: that their representatives were entitled to their shares.

HENRY WHITTELL, by his will, dated 15th December, 1804, gave to his executors 2,000*l.* 3 per cent. consols, and 1,000*l.* 4 per cents. upon trust, for the separate use of his wife for her life; and after her death, the two sums were to sink into the residue of his estate. He also gave to his wife a leasehold house, with the use of his household goods, furniture, plate, linen, and china, for her life; all which, on her death, were to fall into the residue. He then gave 1,400*l.* 3 per cent. consols, upon trust, for his son John Whittell, for his life; and after his death, to fall into the residue; and another sum of 1,400*l.* 3 per cent. consols, upon a similar trust, for his son Michael Whittell. He gave 600*l.* 3 per cent. reduced, and 200*l.* 3 per cent. consols, upon trust, for the separate use of his daughter Mary, the wife of Charles Cumming, for her life; and after her death, to fall into the residue; he gave three sums of 600*l.*, 1,400*l.*, and 300*l.*, 3 per cent. reduced, upon similar trust, for his three daughters, Winifred, the wife of W. Powell, and Charlotte, the wife of Henry Dudin, and Elizabeth, the wife of Benjamin Ellis. He gave 400*l.* 3 per cent. reduced, in trust to pay the interest and dividends to his son George Whittell, for his life; and after his death, unto and equally between and among all and every the child and children of the said George Whittell, share and share alike. He next gave to his executors a sum of 1,400*l.* 3 per cent. reduced, upon trust, to lay out and expend the sum of 30*l.*, part of the interest and dividends, annually, upon the clothing and other necessaries of his son W. H. Whittell; and directed, that

† *Kellett v. Kellett* (1868) L. R. 3 H. L. 160; *Cooke v. Cooke* (1887) 38 Ch. D. 202.

the remainder of the interest and dividends of the said stock, with the said stock itself, and any eventual *share of his said son in any of the legacies given by his will, or in the residue, should be allowed to accumulate until he should attain the age of twenty-four years, and should then be paid to him; if he died under that age, without lawful issue, it was to fall into the residue. He devised his freehold and leasehold estates to his executors, upon trust to sell; the produce of the sales to form part of the residue of his estate and effects, of which he made the following disposition:

WHITTELL
 v.
 DUDIN.
 [*280]

“And as to all the rest, residue, and remainder of my estate and effects whatsoever and of what nature or kind the same may be, I give and bequeath the same and every part thereof, unto, and equally between and among my said wife and my said sons and daughters; subject, nevertheless, as to the parts and shares of my said daughters respectively, which are to be placed and continued in the funds on government securities, in the names of my said trustees, or the survivors or survivor of them, and the executors and administrators of such survivor; and the dividends, interest, and produce thereof from time to time respectively paid into the respective hands of my said daughters for and during their respective natural lives, and to and for their own respective, sole, and separate use and benefit, to the intent and purpose that the same, or any part thereof, shall not be liable to the debts, controul, disposition of their or either of their present or any after-taken husband or husbands, but be and remain an unalienable provision to and for them and to and for their and each of their respective, sole, and separate use; and that the receipt and receipts of my said daughters respectively from time to time shall be sufficient discharge or discharges to my said trustees, or the person or persons paying the same; and from and after the decease of each and every of my said daughters respectively, I give and bequeath the *part and share to which my said daughters respectively shall have been entitled, to the interest, dividends, and produce for life as aforesaid, unto the respective child or children of such respective deceased daughter, in equal parts, shares, and proportions, with benefit of survivorship, in case of the death of any or either of them under

[*281]

WHITTELL the said age of twenty-four years, without lawful issue, and if but
v.
DUDIN. one such child, then to such only child."

The testator, by a codicil, directed that the interest and dividends of the share or shares to which the child or children of his daughter Elizabeth should become entitled, should be paid to their father, to be applied towards their maintenance, till they should attain the age of twenty-four years.

The testator died in March, 1805, and the different legacies bequeathed by his will, as well as the residue, were invested in the names of his executors. Two of his daughters, Charlotte Dudin, and Winifred Powell, died some years afterwards, without having had any issue; and their husbands took out administration to them. The bill was filed against them and the executors, by the other sons and daughters of the testator, and the children of one who had died, being also the next of kin of the testator; and the question was, whether the shares of the residue, to the interest of which the daughters who had died without issue, were entitled for their lives, passed to their husbands as their representatives, or to the plaintiffs, as undisposed of.

Mr. Agar and Mr. Roupell, for the plaintiffs:

[*232] The testator has given a share of the general residue for the separate use of each daughter, for life; after their *deaths, these shares were to be divided among their children, if they had any; but he has made no provision for the event of their dying without issue; that event having now happened, the shares are undisposed of. The gift to the children having failed for want of objects, the effect is the same as if it had been inoperative for any other reason, *e.g.* as if it had been void by the Statute of Mortmain; it must go to the next of kin. His describing these shares as those, to the interest of which his daughters would be entitled for life, proves that he did not conceive himself to have given them an absolute interest; and the husbands are excluded with great anxiety.

Mr. Horne, and Mr. Barber; Mr. Wetherell, and Mr. Pemberton, for the defendants:

The first words of this residuary clause, taken alone, give the

shares absolutely ; that which follows is only designed to preserve them from the power of the husbands, and to secure the benefit of the bequests to his daughters and their children. Words divesting an estate, must be as clear as those conferring it. The expressions, "subject nevertheless," &c. cannot therefore take away entirely the effect of the preceding clause, and can only abridge the interest to the extent of the purposes declared. He clearly did not mean to die intestate, as to any part of his property, and he was not likely to have overlooked the probability of his daughters not having children. They cited *Smither v. Willock*,† and *Galland v. Leonard*.‡

WHITTELL
DUDIN.

THE MASTER OF THE ROLLS :

I cannot say that I consider this as a will that on either construction is entirely free from doubt ; and I confess that the impression on my mind varied in the progress of *the argument. It is not very correctly framed ; but we must endeavour to find out, as well as we can, the intention so imperfectly expressed.

[*283]

The latter part of the residuary bequest is not to be looked upon as the sole and original bequest to his daughters and their children, but as a qualification annexed to another gift ; and we must therefore consider, not only what the testator intended to become of it, in the event of the daughters having children, but also what he intended in the other event of their not having any ; for we must suppose, that he looked forward to both events. The daughters were all married at the time, and two of them had no children ; he can therefore hardly be imagined, not to have contemplated the chance of their dying without any. The question then is, whether he intended to leave this event unprovided for, or to cover it by any of these expressions ; and we must not impute intestacy to him, if the event was one that could not have escaped his notice, and the words are sufficient to extend to it.

Now, consider the general plan of the will : he enumerates the objects, giving to each of them a life interest in a portion of his personal property, providing liberally for his wife, and for the

† 9 Ves. 233 [a case which followed *Harrison v. Foreman*, 5 R. B. 28 (5 Ves. 207).—O. A. S.]
‡ 18 R. B. 44 (1 Swanst. 161)

WHITTELL
v.
DUDIN.

children, in different proportions; which might probably arise from his having unequally provided for them before. As to the daughters, the legacies were given to trustees, for their separate use, guarded in the same manner as their shares of the residue, to form an inalienable provision; and, with respect to all, except two of the sons, he gives them the interest of the legacies for their lives, and afterwards they are to fall into the residue.

[*284]

The plan of the disposition, therefore, was to give separate *parts to each for life, and then to reserve the residue, consisting of the rest of his property, together with the accumulated produce of those parts. It is said, that there being a residuary clause shews that the testator could have had no intention of dying intestate as to any thing; but, I think, that does not follow; for where it is given in parts, there may be an entire disposition, comprising every article of his property, but which, though complete as to the subjects of gift, may be incomplete as to the persons to take the different shares.

With respect to the residue, he begins by declaring a general purpose of equality; he gives it unto and equally between and among his said wife and his said sons and daughters. Stopping here (not in the construction, but for the sake of observing the intention), it is evident that the sons and daughters were all to enjoy equal shares, without any distinction between the sexes; none taking a larger proportion, or a larger interest, than the others. Then, if the design that was uppermost in his mind was that of making all participate equally, having made up before for any previous inequality of provision, one thing is clear, that he meant to give an absolute interest to the widow and the sons; and if all were to be treated alike, the idea was, that the daughters were to take the same interest. It might have been that they were to be equal in amount, but not in interest; but *primâ facie*, equality in both respects appears to have been intended.

These words follow, "subject nevertheless, &c.;" and it is not a mere verbal argument, that these are words frequently accompanying an absolute gift; as subject nevertheless, to the payment of a sum of money or to any other qualification. He might think it proper, with respect to the daughters, to accompany the legacies with a bequest to trustees, not to break in upon *the

[*285]

entirety of the interest meant for them, but to prescribe a different mode of enjoyment. In all the former gifts to the daughters, he had interposed trustees; he had not done so in the first part of this clause; he here takes up the idea that had governed him in the prior part of his will, "subject, nevertheless, as to the parts and shares of my said daughters respectively, &c.;" he still speaks of them as the shares of the daughters, and treats them as sums which are to be taken out of and separated from the residue: they were to be laid out in the names of trustees, being, as he has described them, the daughters' shares, to form a provision for them during the coverture; and, after their deaths, to go to their children, if there were any. But that does not exhaust it; it only meets one event; what was to become of it, if there were no children? Why has he not said, that the daughters are to have the same absolute interest as the sons; and that it should be laid out in the funds for them? He meant that the husbands should not take it; that they should not have it in their power to deprive the children of their successions; that is the qualification subject to which it is given to the daughters. It is difficult to conceive it possible that the parent of two married daughters, having at that time no children, should take it to be certain that they must have children. And how can we suppose, equality being his object, that he meant their shares, if they died without issue, to devolve upon the others. Could he have intended such a disposition, destroying all equality? for the brothers had their shares absolutely, and at all events; the sisters would have it absolutely, if they had children; for giving it to their children, to whom they ought to leave it, is to be considered the same as giving it to them; but if they had no issue, they were only to have a life-interest. I think it improbable that that was the intention; but we are not to go on probabilities; the *Court is bound to reconcile, if it can, both parts of the will. We can reconcile them, if we suppose the shares to be given equally, accompanied with a qualification that is not inconsistent: by the other construction we cannot, for it would convert that which purports to be an absolute gift into a gift for life.

WHITTELL
v.
DUDIN.

[*286]

The two cases cited do not come up to this; the only way in
R.R.—VOL. XXII. K

WHITTELL
v.
DUDIN,

which they apply, is by shewing that an absolute bequest, accompanied by a gift over on a certain event, is not necessarily cut down to the time of the event happening, as it may be only subject to the contingency of its happening within a certain period. The comparison to the case of a bequest void by the Statute of Mortmain, does not apply; for if it had been what without the statute would have been a complete disposition, the idea of his having contemplated any other event would have been excluded. The difference is, that the gift to children may or may not take place, according as there are or are not any born, and is not an entire disposition at all events.

I think that this is the case of a parent professing in the first part of the sentence, to treat all his children equally with respect to the residue, and that the subsequent part is not inconsistent with that design, but is only a cautionary provision, to preserve the benefit of the bequest to the daughters and their children.†

1821.

Dec. 8, 9.

Lord
ELDON, L.C.

[287]

LECHMERE v. BRASIER.‡

(2 Jacob & Walker, 287—290.)

Purchaser of estates sold under a decree, discharged, on motion, from his purchase, upon error in the decree being shewn, though the parties are proceeding to rectify it.

Will of real estate not to be proved on a reference before the Master.

The rule of compelling a purchaser to take the estate where a title is not made till after the contract is not to be extended.

THE bill in this cause was filed by the simple contract creditors of S. Brasier, who died intestate in the year 1813, against his administratrix and heir-at-law, who was an infant, and a second mortgagee of his real estate, for payment of their debts, alleging that the deceased was a trader subject to the bankrupt laws at the time of his death. Witnesses were examined with the view of establishing this allegation, which, however, did not appear to have been satisfactorily made out.

† Reg. Lib. B. 1820, fol. 92.

‡ The remedies of simple contract creditors of a deceased trader against the land of their debtor,

originally given in 1807, were not extended to the simple contract creditors of non-traders until 1833.—O. A. S.

On the 2nd of July, 1816, a decree was made, directing the usual accounts to be taken of the intestate's debts and personal estate, and the latter to be applied in a course of administration; and also ordering the appointment of a receiver of the rents, and a sale of the real estate, and the money to be paid into the bank, with liberty to all parties to apply.

LECHMER
v.
BRASIER.

The estates were sold on the 24th of October, 1818; the Master, on the 31st of October, reported Mr. Lea the purchaser of lot 1, and his report was confirmed on the 28th November, 1818.

In May, 1820, a motion was made, that the purchaser should pay his purchase-money into Court, which was resisted, amongst other grounds, on that of the irregularity of the decree; and the motion was refused with costs.

The original cause, without any notice being given to the purchaser, was then reheard, and on the 1st of July, 1820, the former decree was altered, by directing a reference to the Master to inquire whether the intestate was, at the time of his death, a trader within the *intent and meaning of the several statutes relating to bankrupts.

[*288]

The purchaser, Mr. Lea, moved before the Vice-Chancellor, that it might be referred to the Master to tax him his costs, occasioned by the confirmation of the report of the purchase, and the investigation of the title, and that the plaintiffs might pay the same; and that he might be discharged from his purchase. His Honour directed the motion to stand over, and come on with the cause on further directions. The motion was now renewed.

Mr. Horne and *Mr. Parker* in support of it, argued, that the purchaser ought to be relieved from his purchase, inasmuch as the original decree, which was the foundation of his title, had fallen to the ground, and that, being no party to the decree, he was entitled to his costs. The second decree does not declare the trading, or direct a sale; and the purchaser cannot be kept in suspense till a further decree is obtained.

Mr. Shadwell opposed the motion, on the ground, that if there was error in the first decree, it had been rectified; and

LECHMERE
v.
BRASIER.

in a short time a complete decree for a sale would be obtained; and that, as it did not appear that a good title could not be made, the Court would not so determine without a reference; and if a title was procured before the report, it would fall within the common rule. As to the other point, he contended that a person purchasing estates under a decree, to which it turned out that a good title could not be deduced, always paid his own costs.

THE LORD CHANCELLOR :

[*289]

The form of the second decree is open to objection, in directing a reference as to the fact of trading; it is also wrong in not reversing the first. The utmost that you can do in such a case as this, where *the heir-at-law is an infant, and it is not made out, both in point of allegation and proof, that the deceased was a trader, is, to take a decree much in the same form as when the will is not proved, in which case you take a decree for an account of the personal estate, with liberty to exhibit interrogatories to prove the will; you cannot prove it on a reference; the Court does not refer it to the Master to see what is the effect of the evidence, but the declaration that the will is well proved, is made by the Court itself upon reading the evidence; however, it is clear that the decree, in its original form, was wrong.†

With respect to this motion, I must say that I will not extend the rule which the Court has adopted, of compelling a purchaser to take the estate where a title is not made till after the contract, to any case to which it has not already been applied. The rule has, in many instances, been productive of great hardship; and I feel particularly unwilling to extend it to this case, where, to entitle these simple contract creditors to a sale, they must prove a fact which subjects the purchaser to some hazard, whatever it may be. Let the purchaser therefore be discharged from the purchase. As to costs, the rule in general is, that the suitor must pay for the mistakes of the Court. It is true, the purchaser

† On reference to the original decree, it appears that the second mortgagee, who was a party to the suit, had a power of sale, and it was

expressly stated that the receiver was appointed, and the estates were directed to be sold with his consent.

was not a party to the suit ; but still the other parties have been misled by the Court : they have been acting on its judgment, and it requires consideration whether they should be made to pay the costs.

LECHMERE
v.
BRASIER.

Mr. Horne then consented, upon being discharged from the purchase, to give up the costs.

* * * * *

ATTORNEY-GENERAL *v.* BERKELEY.

(2 Jacob & Walker, 291—294.)

Opinion of counsel ordered to be produced, where it was taken by a tenant, with reference to his landlord's title, and where the case was stated for the benefit of both parties.

1820.
Dec. 9.

Lord
ELDON, L.C.
[291]

THIS was an information, filed at the relation of the parish officers and some of the inhabitants of East Moulsey in the county of Surrey, for the purpose of setting aside a lease for ninety-nine years, granted in the year 1789, of certain lands called the Hale, and Hale Platts, situate in the parish, and for the delivery of all deeds, &c. and a case and opinion, in the possession of the defendants, relating thereto. The information stated that the lands in question had been originally granted for the benefit of the poor of the parish, and had been let from time to time by the parish officers for upwards of one hundred years : the defendants, as they admitted by their answer, or their ancestors, had been the lessees of the lands which were intermixed with lands of their own, and had paid rent to the officers since 1767. Under a late Inclosure Act, which had been solicited by the defendants, the Hale lands were allotted to them as part of the waste and common field lands, in respect of their rights, as impropriate rectors, and, in consequence, they refused to continue to pay rent.

It was further stated, that disputes having existed between the parish and Sir T. Sutton, the lessee under whom the defendants claimed, respecting the right to the above land, a case upon the subject, drawn up by H. Swan, then one of the churchwardens, and approved of by Sutton, or his solicitor Ashe, was submitted

ATTORNEY-
GENERAL
v.
BERKELEY.

[*292]

to Mr. Serjeant Hill in the year 1788, who refused to answer it, in consequence of no solicitor's name appearing on it, and that the name of Ashe was then indorsed on the case, which was returned to the Serjeant, who gave an opinion in favour of the title of the parish. Soon afterwards the lease for ninety-nine years was obtained, and, at the same time, a previous agreement entered into by Sutton for a twenty-one years' lease * was cancelled. It was also alleged, that the fee on the case was paid by the parish officers, and that it, as well as the opinion, were retained by Swan until he left the parish, when he delivered them, with other documents, to Sutton, who undertook to produce them to the officers of the parish when required.

The defendants, by their answer, represented that the Hale lands were parcel of the manor of Moulsey, lately purchased by them from the Crown, and had formerly been subject to certain rights of commoning; and that the practice of turning in cattle having been discontinued, the parish had for many years wrongfully let the lands, and received rent instead. They insisted that they had acquired an absolute title by the award made under the Inclosure Act, the commissioners being authorised to determine what lands should be inclosed. They believed that a case had been stated by Ashe for the opinion of Mr. Serjeant Hill, and that Sir T. Sutton retained possession of both; and they admitted that they and the lease for ninety-nine years were now in their possession, and that the opinion was in favour of the parish; but, except as above, the defendants were altogether ignorant of the disputes, and the other circumstances respecting the case and opinion mentioned in the bill.

A motion was now made for the production of the lease and the case and opinion: no opposition was made to it, except as to the opinion.

The *Attorney-General* and *Mr. Pepys*, in support of the motion. * * *

[293]

Mr. Shadwell, for the defendants, admitted that the produc-

ATTORNEY-
GENERAL
v.
BERKELEY.

tion of the lease and case could not be resisted ; the question as to the latter had been set at rest by the decision of the House of Lords, in *Radcliffe v. Davey*, in 1780.† But with respect to the opinion, the plaintiffs, he contended, were not entitled to the production of it, as there was no evidence that the case was stated by or for the parish. * * *

THE LORD CHANCELLOR :

No opposition, I understand, is made to the production of the lease and case. I agree that it is another thing to order the production of the opinion ; but, nevertheless, I am of opinion, that the plaintiffs have in this case a right to see it also. Sir T. Sutton held as tenant of the parish, and wherever a person obtains possession as tenant, he is to keep it under an obligation to preserve his landlord's title, and being under that obligation, if he intermixes the lands, or does other acts to his landlord's prejudice, they will be set right at the expense *of his own property. Being in that possession, and though some of the expressions are not very clear, I am satisfied, taking the whole together, that the case and opinion, if they do not belong to the parish, were stated and taken for the mutual benefit of both parties, and that the opinion ought, therefore, to be open to the inspection of both.‡

[*294]

† 3 Bro. P. C. Toml. ed. 538.

‡ Reg. Lib. A. 1820, fol. 139.

1818.

Oct. 30.

ATTORNEY-GENERAL v. MAYOR OF BRISTOL.

(3 Maddock, 319—352. Reversed on Appeal, 2 Jacob & Walker, 294—332.)

LEACH, V.-C.

On Appeal.

1820.

April 20, 25.

Nov. 13, 15, 17.

8, 20, 21, 28.

Dec. 11.

Lord

ELDON, L.C.

[294]

By deed, a corporation, to which a sum of money has been given for the purposes mentioned in the deed, and to the intent that it might be laid out in the purchase of lands of the clear yearly value of 120*l.* and more, covenants to pay thereout annual sums of nearly the same amount to certain charities in rotation; the corporation itself being one of those charities, there being no express gift of the surplus, and the decrease and subsequent increase of the rents being in certain events provided for: Held, that the other charities were not entitled to call for a distribution of the increased rents.

The rules prevailing for the construction of gifts to charitable uses, are to be considered only as furnishing *indicia* of the donor's intention.

In distributing the increased rents of a charity estate, the Court of Chancery has authority to alter not only the proportions in which the objects of the charity would take under the original instruments, but also the objects themselves.

Although a charity is not barred by the Statute of Limitations, an adverse enjoyment for a long time is a very material consideration in construing an instrument under which it claims.

THE object of the information and bill filed in this cause, was to obtain a decree declaring, that the increased rents of certain estates, out of which, in the year 1566, annual sums of a given amount were covenanted to be paid by the corporation of Bristol, to certain charities in rotation, ought to be applied for the benefit of those charities. * * *

[295]

The statements contained in the information, and the prayer of it, together with the deed, on the construction of which the question in the cause depended, [are given at length in the report below in 3 Madd., but it is thought that a summary of these statements and matters will suffice for the purpose of this report.] It was mentioned at the Bar that an information similar to the present had been filed in the year 1713, and that an answer had then been put in by the Corporation of Bristol, by which it appeared, *that the lands producing the 76*l.* per annum had been purchased for 800*l.*, but that the increase of the rent, in 1713, was so inconsiderable, as to give little encouragement to prosecute the information. The judgment of the Court, however, was given, without any reference to this fact, or to the statements in the information, and was expressly confined to the question, whether, upon

[*296]

the construction of the deed alone, the information could be sustained.

ATT.-GEN.
v.
MAYOR OF
BRISTOL.

1818.
Oct. 30.

[3 Maddock,
320.]

The information and bill stated, that Sir Thomas White, Knight, [deceased, did, in or about the year 1566, deliver and pay to the then Mayor, Burgesses and Commonalty of the city of Bristol, the sum of 2,000*l.* to the intent and purpose, and upon trust, to purchase hereditaments of the then clear yearly value of 120*l.* and upwards, above all yearly charges and reprises; and to settle and hold the said estates, when so purchased, in trust, for the equal accommodation and advancement of twenty-*four cities, boroughs, towns, corporations and companies, as mentioned in the deed or indenture hereinafter stated, and the same was to be a perpetual charity and benevolence of said Sir Thomas White, for ever: That the Mayor, Burgesses and Commonalty, accordingly, upon or shortly after the receipt of the said 2,000*l.*, invested some part thereof in the purchase of divers hereditaments, within the said city of Bristol, and elsewhere, in the counties of Gloucester and Somerset, and by letters patent, dated the 9th July, in the thirty-fifth year of his late Majesty King Henry the Eighth, such premises, so purchased, were given and granted to the said Mayor, Burgesses and Commonalty of the said city of Bristol, and their successors for ever; and such premises, were therein stated and expressed to be, as the same in fact were, of the then clear and yearly value of three-score and sixteen pounds, as by the letters patent would appear: That upon or shortly after the making of such purchase, a certain Indenture, bearing date on or about the 1st of July, 1566, was duly made and executed by and between and under the common seal of the said Mayor, Burgesses and Commonalty of the city of Bristol, of the one part; and the plaintiffs, the President and scholars of the College of St. John the Baptist, founded in the University of Oxford, by the said Sir Thomas White, Knight, and Alderman of London, of the second part; and the Master and Wardens of the Merchant Taylors of the fraternity of St. John Baptist, in the *city of London, of the third part: whereby it was witnessed or recited, that whereas the said Mayor, Burgesses and Commonalty had received 2,000*l.* of the said Sir

[*321]

[*322]

ATT.-GEN.
v.
MAYOR OF
BRISTOL.

Thomas White, Knight, of his benevolence and gift, as well for the benefit and commodity of the said city of Bristol, and the inhabitants of the same, as also for the advancement and commodity of other cities and towns thereafter expressed and specified, and to be employed to such other uses, purposes and intents, as were thereafter mentioned and declared, and of which said sum of 2,000*l.* the said Mayor, Burgesses and Commonalty, did acknowledge themselves satisfied, contented, and paid; which said sum of money was delivered to the Mayor, Burgesses and Commonalty, to the intent that they should therewith purchase hereditaments, to them and their successors, to the clear yearly value of six-score pounds and more; and further reciting the aforesaid purchase and the letters patent, it was thereby further covenanted, granted and agreed between said parties to said indenture, *that they the said Mayor, Burgesses and Commonalty, should, within four years then next ensuing, obtain and purchase to them and their successors for ever, hereditaments of the clear yearly value of six-score pounds and more, over and above all yearly charges and reprises, with the lands before by them purchased and assured of the late King Henry Eighth as aforesaid; which hereditaments so to be purchased and already purchased, and the rents, issues and profits thereof, should be employed by the said Mayor, Burgesses and Commonalty, in manner thereafter specified, and to no other uses, intents or purposes. Under the provisions of this deed the Corporation of Bristol were to apply the sum of 100*l.* a year for certain specified charitable purposes in Bristol at the Feast of St. Martin, each year for eight successive years, commencing in the year 1567, and a sum of 200*l.* for a certain other charitable purpose at the Feast of St. Martin in the year 1575, and should afterwards at the Feast of St. Bartholomew in each year (commencing in the year 1577), pay successive yearly sums of 104*l.* to twenty-four other boroughs, corporations and cities there specified, in yearly rotation, for certain specified charitable purposes which would require 100*l.* each year, the remaining 4*l.* each year to be employed by the Corporation receiving the same as to them should be thought good for their pains to be taken in and about the receipts and payments of the said 100*l.*] *And it

[*323]

[*332]

was further covenanted and agreed, that if the said Mayor, Burgesses and Commonalty of Bristol, their successors and assigns, should fail and make default of payment of all or any of the sums of 104*l.* above limited, to any of the said cities or towns aforesaid, in part or in all, that then, they and their successors, should forfeit and pay to the said President and scholars, and their successors, the several fines and penalties following; that is to say, for the first time of non-payment or non-delivery up of the said 104*l.* to any of the said cities, company or towns, as it should be due when the forfeiture was made, to forfeit 110*l.*, and the second time of the like forfeiture 115*l.*, and for the third time 120*l.*, for the fourth time 130*l.*, for the fifth time 140*l.*, for the sixth time 150*l.*, and so at every time from thenceforth for ever, the forfeiture of 150*l.* to the said President and scholars; all which said forfeitures so from time to time made, the said Mayor, Burgesses, and Commonalty of Bristol thereby covenanted and bound themselves and their successors *to answer and pay to the said President and scholars, and their successors and assigns, from time to time, whenever such forfeiture should happen: provided always, that if at any time thereafter the rents of the lands, tenements and hereditaments therein and hereinbefore specified, should be notoriously decayed by misfortune, by reason of fire or other like occasion, be lawfully evicted by order of law, and taken from the possession of the said Mayor, Burgesses and Commonalty of Bristol, without fraud, and not with the negligence of the Mayor, Burgesses and Commonalty, whereby, upon declaration of account thereof, made upon the oaths of four of the Aldermen of the city of Bristol, of all said decays, to the President, Vice-President, and two of the ancient Fellows of St. John the Baptist, in the University of Oxford, for the time being, and the Mayor of the city of Gloucester aforesaid, and one of the Aldermen of the same for the time being, so as it shall truly and evidently appear to them, that the rents and profits of the lands, tenements and hereditaments, purchased and to be purchased as aforesaid, for the purposes therein and hereinbefore specified, remaining, should not be sufficient to bear the charge before and thereafter mentioned, over and above the reparations and other charges by the judgment of the President and

ATT.-GEN.
v.
MAYOR OF
BRISTOL.

[*333]

ATT.-GEN
of
 MAYOR OF
 BRISTOL.

[*334]

Vice-President, and two of the ancient Fellows and said Mayor and Aldermen of the city of Gloucester for the time being, or the most part of them; that then and from such time of such decay and declaration, and certificate thereof, the payment aforesaid and thereafter mentioned, touching as much as the decay should be, should cease, and not be paid until such decay be amended: And it was thereby further covenanted and agreed that said Mayor, Burgesses and Commonalty, *and their successors, within as convenient time as they might levy of the profits, and lands, tenements and hereditaments, so much as should be liable to supply such decays as aforesaid; that then the Mayor, Burgesses and Commonalty for the time being should employ the same profits according to the uses in the now stating indentures specified: And it was further covenanted and agreed, that the said President and scholars, their successors and assigns, should from time to time from thenceforth, as often as any of the said forfeitures should come to their hands by the non-payment of the said 104*l.* to the head officers of the said towns, company or cities aforesaid, to whom it should be due and payable at the day, time and place aforesaid, according to the tenor of the now stating indenture, pay or cause to be paid to the Mayor, Burgesses and Commonalty, or other head officers of the said city, company or towns, to whom such default of payment was made of the said 104*l.*, all the same sum of 104*l.*, upon such conditions, uses and purposes, to be used and employed from time to time for that year, that any of the forfeitures should come from and be in the hands of said President and scholars and their successors, as fully and amply in every thing as by the head rulers and officers of said cities, company and towns aforesaid, to whom default of payment thereof should be made by the said Mayor, Burgesses and Commonalty of Bristol aforesaid, it should have been paid according to the true meaning of the now stating indenture, as if no such forfeiture or default had been made.

[Other material provisions and clauses of the deed are sufficiently referred to in the judgment, *post*, pp. 151—156.]

The information then stated the purchase of further property by the Corporation of Bristol pursuant to the covenants in the

deed to the clear yearly value of 120*l.*, and that the said Corporation had from time to time paid in rotation to the respective corporations entitled under the deed the said sums of 104*l.* at the respective times thereby provided : *That the said Sir Thomas White departed this life in or about the month of February, 1561, and did not at the time of his death leave any heir at law him surviving, or, however, none such can now be found, after the most diligent search and inquiry : That since the time of the execution of the said indenture, and the aforesaid purchase and acquisition by the said Mayor, Burgesses and Commonalty of the city of Bristol, of the said trust estates and premises, the rents and profits of such estates and premises had very greatly increased, and the same had for very many years last past amounted to some thousands of pounds : That the Mayor, Burgesses and Commonalty of the city of Bristol had received large sums of money by way of premiums or fines, for the granting to them of divers leases or renewals of leases of the trust estates and premises ; by means whereof the profits and revenues of the charity or trust estates had been also considerably increased and enlarged : And the plaintiffs claimed that they, and the several other corporations interested in the said charitable donations, were] *entitled, according to the true meaning and intent of the said indenture, to have the full benefit and enjoyment of all such increased revenues, and that they were and are now entitled to be paid the said sum of 104*l.* much oftener than in such respective intervals and periods originally provided by the deed for that purpose, or otherwise, they were and are entitled to have the original sum or payment of 104*l.* so directed by the deed to be made to each Corporation as aforesaid, very greatly increased, or otherwise such improved rent, issues and profits of said charity estates, ought in some manner to have been paid and delivered over to the plaintiffs and the several other corporations named in the deed, in order that such increased sums or payments might be by them respectively applied to the charitable purposes provided and directed by the deed. * * *

[And they claimed relief accordingly.]

ATT.-GEN.
v.
MAYOR OF
BRISTOL.

[*340]

[*341]

To this information and bill, a general demurrer, for want of

[344]

ATT.-GEN.
v.
MAYOR OF
BRISTOL.

equity, was put in by the Mayor and Burgesses and Commonalty of Bristol, and by John Langley, [their Chamberlain, which demurrer was overruled by His Honour Vice-Chancellor LEACH.

The defendant appealed from the order overruling the demurrer.]

1820.

[2 J. & W.
296]

Mr. Hart, Mr. Wingfield, and Mr. Garratt, for the appellants, in support of the demurrer. * * *

[301]

Mr. Trower, Mr. Wetherell, Mr. W. E. Taunton, and Mr. Phillimore, for the respondents, in support of the information. * * *

[The arguments of counsel and the cases cited by them sufficiently appear from the following judgment:]

[307]

THE LORD CHANCELLOR:

In former times the Court acted upon principles in the construction of deeds and wills, when charity was the object, which, if they could be re-considered, would not now be adopted. If the doctrine of resulting trusts had been then understood, the right of the heir at law would never, in all probability, have been got over. The doctrine laid down in the *Thetford* case, which has been adhered to since, was, that if the whole land, and rents of it, at the time, are given for a charity, those to whom the lands are given, must, if there is an increase in the rents, apply them to charitable purposes. There are other cases where the same doctrine has been held, not only where the gift has been of lands; but where it has been of rents and profits. That must be admitted. This case has these peculiarities, that those who have the lands vested in them are part of the objects of the charity, and being so, it likewise appears upon the face of the deed, that there must be an excess beyond the amount of the fund distributable amongst the objects of the charity. The *Thetford* case† can hardly apply, if, upon the whole instrument taken together, it appears that it was not intended to give the whole value of the property to these charities

† 8 Co. Rep. 130 b.

which take 104*l.* a year. If I give an estate to trustees, and take notice that the payments are less than the amount of the rents, no case has gone so far as to say, that the *cestui que* trust, even in the case of a charity, *is entitled to the surplus; there would either be a resulting trust, or it would belong to the person who takes the estate. The case of the *Attorney-General v. Arnold*† established this; that if I give to A. B. my lands for charitable purposes, and then give sums of money to charities not amounting to the whole rents, A. B. is a trustee of the surplus for charitable purposes, to be ascertained by the King's sign manual, or the Court of Chancery: but suppose that A. B. was a charitable corporation, might it not be argued, that the gift of the lands, and certain payments out of it, would make good the recital, because one charity would take in the shape of lands, and another in the shape of a pecuniary payment. That case went on a principle in favour of charities, acted upon by this Court in several cases, (which, if new, could not, I think, be sustained,) viz. that though a particular purpose fails, effect will be given to the general intention. This was carried to a still greater length in a case, where a sum given by will, for the support of a Jewish synagogue, was applied to the support of a foundling hospital.‡ It would have caused some surprise to the testator if he had known how his devise would have been construed. * * *

ATT.-GEN.
v.
MAYOR OF
BRISTOL.

[*308]

The LORD CHANCELLOR afterwards observed that the *Solicitor-General* appeared to have been made a party, *(a thing which he had never heard of before), on a suggestion that White had left no heirs, and that, if so, and it could be made out to be a resulting trust, the Crown would no doubt be entitled to the surplus; but it was important to consider whether the Crown might not have an interest of another sort, and be entitled to contend on the ground of the fund being devoted to charitable purposes, that it had a right by its sign manual to direct the application of the surplus.

[309]

[*310]

The present information was framed upon the notion, that the charities mentioned in the deed were entitled to the surplus: it

† Show. P. C. 22.

‡ *De Casta v. De Pas*, Ambl. 228.

ATT.-GEN.
 v.
 MAYOR OF
 BRISTOL.

did not contain any prayer in the alternative, and although the Court, in the case of a charity, was in the habit of applying the fund in the way in which it ought to be applied, without regard to the prayer of the information, there was a difficulty in allowing the *Attorney-General* that latitude of argument in this case, on account of another law officer of the Crown having been made a defendant, who might bring forward the claims of the Crown. If the Crown was entitled to direct the application of the surplus by its sign manual, or to claim it as *ultimus heres*, it would have an interest, though not as against the prayer of the present information, in destroying the demurrer. It was impossible therefore to decide that Bristol was not a trustee of the surplus, without hearing the *Solicitor-General* on these points.

The case stood over for some days, to give an opportunity to the counsel for the Crown to discuss the points suggested by his Lordship, if they thought proper. *Mr. Mitford* afterwards stated, that he had been instructed to support the right of the Crown, as representing the heir at law; but the LORD CHANCELLOR observed, that in that character the Crown had no chance, and he was only desirous *of hearing counsel in support of the right of the Crown to direct the application of the surplus. No further argument, however, was addressed to the Court.

[*311]

Dec. 11.

THE LORD CHANCELLOR (after some prefatory remarks) said :

[315]

Regard being had to the fact, that from the year 1566 down to this time, the enjoyment of this property has, as it appears to me, been as adverse as it could be to the prayer of this information; and regard being had to the fact, that the *Coventry* case† occurred in 1700, and that there was a proceeding as to this property in 1713, (and I should be inclined to think, if I were at liberty to form a conjecture, that if the proceedings at that time had been carefully looked into, something might have arisen material to be considered in this case,) the question is, whether, according to the true intent and meaning of this

† See 18 R. R. 238 (3 Madd. 353).

deed, the corporation of Bristol are trustees of the surplus rents and profits, or any and what part of them, for these corporations.

ATT.-GEN.
v.
MAYOR OF
BRISTOL.

The principles of the Court on this subject, as deducible from the text-writers and authors, will take no great time to mention ; they are not open to much controversy, and I think they may be found in Duke's Law of Charitable Uses. In chap. vii. s. 2, p. 112, it is laid down, that " if one deviseth the rent of his land to a charitable use, this shall be taken largely for a devise of the rent then reserved, or afterward to be reserved, *upon an improved value ;" the cases in chap. vi., which are referred to in illustration of this doctrine, and some others to be found in the same chapter, it is material to attend to. In that of the *Inhabitants of Eltham v. Warreyn*,† it is laid down, that if land of the value of 8*l.* per annum be given to repair highways, and it afterwards increases in value to 11*l.*, the whole of it must be applied in the same manner. By the second resolution in the case of *Sutton Colefield*‡ it was resolved, " that if lands of the value of 8*l.* per annum be given to maintain a schoolmaster ; and, in the deed, it is expressed, that the said 8*l.* shall be only employed to maintain that use, and no other use is expressed in the deed ; and afterwards the land increaseth to a greater value, all the increased rent shall be employed for maintenance of that charitable use," and the reasons assigned are, " because it doth not appear that the donor had any intention that the profits of his land should be employed to any other use, and at the first he gave so much as the land was worth." The next cases are those of *Hynshaw and Pydmers v. Mayor and Corporation of Morpeth*,§ *Kennington Hastings*,|| which are to the same effect ; and then comes the *Thetford School* case,|| in which lands of the value of 35*l.* by the year were devised for the maintenance of a preacher, schoolmaster, and poor people, and certain proportions, amounting together to 35*l.*, were given to each. The lands afterwards increased in value, and it was decided, that the whole revenue must go to charitable purposes. The reasons given for this decision are, " for that it appeareth by the distribution of the

[*316]

† Duke, 67.

§ *Ib.* 69.

‡ *Ib.* 68.]

|| *Ib.* 71.

ATT.-GEN.
 v.
 MAYOR OF
 BRISTOL.

[*317]

devisor, that he intended that all the profits of his lands shall be employed in the charitable works by him founded, and left nothing to his heirs or executors of the profits of his lands, as they were in value at his death, and as if the value of *the lands had decreased, the poor should have lost in their stipends, so when the revenue of the lands increase, they shall gain." And then the following passage occurs, and, with reference to many public bodies, it is one of great consequence ; " and the Lord Coke said, that this resolution did concern all the colleges in the universities and elsewhere ; for when the lands were first given for their maintenance, and that every scholar should have a penny half-penny a-day ; this was then a competent allowance for a scholar, in respect of the price of victuals then, and yearly value of the land ; and now the price of victuals being increased, the first maintenance for scholars is not competent for them ; and as the value of the lands increase, so ought the allowance for the scholars to increase." If the text is to be understood thus, that where property has been given for the foundation of a college, and a distribution has been at the same time made of all the rents to given members of that college, there must be an increase, as the times require, for all those persons : of that there can be no doubt : but unless I am mistaken, there are many cases to be found in both the universities where land has been given of a greater value than the amount of the charges, (which have been for scholars, exhibitioners, and so on,) upon that land, and where in point of fact, the enjoyment has been this : the charges have been made good from time to time, and the surplus has been taken by the college itself, and, I believe, if this were considered an improper application of their funds, it would have the effect of disturbing the distribution of the revenues of many of the colleges in both universities.

[*318]

The construction in these cases, I take it, must be considered to go upon intention, and the different rules furnished by the cases I have mentioned, are to be considered as *indicia* of the intention. Was it then the intention *of the donor that Bristol should be a trustee, bound from time to time, not merely to make the payments mentioned in the deed to these different corporations, but liable, *de anno in annum*, to be called upon,

and that from the first year in which it was trustee, to apply the whole increased value, in proportions similar to those in which the property was distributed, according to its value, in 1566, or that it was to be entitled, after payment of the charges, to retain the surplus in the way in which several colleges retain it under grants to them. As far as I have read these ancient cases, they state it to depend upon the intention of the donor, and that one way of finding out that intention, is, to inquire, whether the whole of the annual value of the property was, at the time of the foundation of the charity, distributed amongst the objects of the charity? If it was, they say, that that circumstance is evidence of the donor's intention to give the whole of the increased value to the same objects. Whether that be a rule of evidence, which good and sound reasoning would have led one to adopt originally, I do not trouble myself with inquiring, but I cannot help feeling the force of what Lord HARDWICKE says in the *Attorney-General v. Johnson*,† that when the *Thetford* case was decided, the doctrine of resulting trusts was but little understood; and if the object of the gift had not been charity, I feel considerable difficulty in believing that this doctrine of the Court would have prevailed. Settled rules of construction, however, must not be disturbed; and this principle is of so much importance in administering the justice of the country, that according to my notion, if there has been not merely a variety of cases, but even only one ancient case, and there has been practice and experience in favour of it, it ought to be adhered to. Another rule to be found in *these ancient cases is, that as the charity would lose if the fund decreased in value, it ought to gain in case it increased. I should have doubted whether that was a sound rule of construction, but I take it to be one as settled as the other, and that therefore, it would not be right to disturb it.

ATT.-GEN.
v.
MAYOR OF
BRISTOL.

[*319]

In applying the two rules which I have mentioned to the present case, it will be necessary to recollect, that the whole annual value of the lands is not exhausted by the payments directed to be made, and that the donor, contemplating and providing for a decrease, directs that a subsequent increase is not to go entirely

† Ambl. 190.

ATT.-GEN. to those who had lost by the decrease, but that only a compensa-
 v. tion is to be made to them.
 MAYOR OF
 BRISTOL.

[After referring to some other early cases, his Lordship continued:]

[321] The next material case is that of the *Attorney-General v. Mayor and Corporation of Coventry*; † it does not appear to me that the statement in any of the reports is exactly conformable to the case which must have been under consideration, when you look to the deed itself, with a copy of which I have been furnished by the Merchant Taylors' Company, and to which I shall presently refer. [His Lordship then read the report of the case from Vernon, and on coming to that part of the judgment in which it is stated that a charity is not barred by length of time, proceeded as follows:] The Statute of Limitations undoubtedly does not apply; but length of time, (although it must be admitted that the charity is not barred by it,) is a very material consideration, when the question is, what is the effect and true construction of the instrument? Is it according to the practice and enjoyment which has obtained for more than two centuries, or has that practice and enjoyment been a breach of trust? If it has, we must not scruple to disturb it; but still regard must be had to that circumstance, and the more so, because, admitting that in the *Coventry* case
 [*322] there had been a century of abuse, we must recollect that *that case was determined about the year 1700; and, if it was understood to afford a rule which was applicable to the present or similar cases, it is difficult to suppose that the persons interested in the Bristol charity could be ignorant of it, as some of the corporations and parties to that suit were the same persons as are interested in the distribution of the Bristol fund; and, in fact, it does appear to have provoked inquiry, for, in 1718, a suit was instituted for the same purpose as the present, but which has never been prosecuted since.

It has been attempted to account for this by suggesting, that the surplus rents at that time might have been so inconsiderable, as not to have made it worth while to prosecute it; but however that may have been, these circumstances led me to make the observations which I have before made, and to state distinctly

† 18 R. R. 238 (2 Vern. 397; 3 Madd. 353).

the grounds of my present judgment. I think I am bound to consider, that, in the *Coventry* case, the property was bought with the money of Sir Thomas White, and, in truth, it is so stated in one of the reports, and in the deed itself. The copy which I before mentioned bears date in 1551, and states, that the purchase was made by the city of Coventry, and that what was so purchased was of the clear yearly value or rent (considering value as rent, and rent as value) of 60*l.* 10*s.* or thereabouts; and, after mentioning that White was minded to relieve and prefer the commonwealth of the city of Coventry, then in great ruin and decay, (certainly not stating, as in the Bristol deed, that it was for the commodity of the other cities), it states that he of his goodness has given the sum of 1,400*l.*; so that the deed expresses the purchase-money to have been wholly supplied by him; and not only that, but it states, that the thing purchased with the 1,400*l.* was of the clear yearly rent and value of 60*l.* 10*s.*, and that is the sum which in different proportions, was distributed amongst *the different objects of the charity. With respect to the form of the deed, which is by way of covenant, I take it, that in deeds of that date, a covenant, in cases of this kind, may be looked upon as a declaration of trust; but there is no passage in this deed, under which it could be held, that the Corporation of Coventry was to pay any of these sums except out of the rents, and save only in case of wilful default. There would be no wilful default if the lands fell in value, and non-payment would not be a breach of the covenant, if they were obliged to incur great expense in recovering the rents. Many circumstances, however, might happen, which would amount to wilful default, and, being trustees, they must be answerable for it whether expressed in the instrument or not. But these engagements, as I read this instrument, are engagements to pay out of the rents and profits, they being estimated at the clear yearly value there mentioned; and that clear yearly value, at the time, being distributed amongst objects which exhausted the whole of it. It therefore falls within the principle of the former cases; there is evidence of that intention which they have determined to be sufficient to carry the increased rents to charity. But no one can read the judgment of Lord Holt, without seeing in it

ATT.-GEN.
v.
MAYOR OF
BRISTOL.

[*323]

ATT.-GEN.
v.
MAYOR OF
BRISTOL.

proofs of the great knowledge of law which distinguished that illustrious man, nor without satisfying himself, that if these older cases had not existed, such a principle would not have been introduced. In the opinion which I give upon the *Coventry* case, I found myself upon the deed itself, and that deed, I apprehend, amounts to an acknowledgment that the money was wholly supplied by Sir Thomas White, and that the clear yearly value of the property was exactly the sum, which was distributed in different proportions among the objects of the charity. If the Corporation thought proper to sign the instrument containing these admissions, they must be bound ; but, upon the construction of that *instrument alone, it appears to me the House of Lords was perfectly right in its decision.

[*324]

The doctrine in the *Coventry* case was shortly afterwards attempted to be applied to this case, and an information was filed for that purpose. It however was not followed up, and the present information has been filed, and prays a different distribution from that which has hitherto obtained, of more or less of this surplus beyond the 104*l.* I say more or less, because, with respect to the difference between 104*l.* and 120*l.* and more, no use is expressed in this instrument, and the difference might have been more than 16*l.* ; for, if the Corporation of Bristol was bound to lay out 2,000*l.*, as the VICE-CHANCELLOR thought, and as I think they were, it would either have produced 120*l.*, (they were bound to get that,) or it would have produced that and more, in the language of this deed. Now, when we are considering what is the effect of words in one part of a deed, and when we are stating that they can apply to no other uses than those expressed in the deed, I ask where there is any use expressed in the deed with respect to the 16*l.* surplus, or where there is any use, if the purchase should produce more than 120*l.* per annum, expressed as to the difference between 104*l.* and that sum. There is no such use, intent or purpose, and the question is, whether these general words, which have been so strongly alluded to, do, or do not, shut out the fair effect, inference, and conclusion to be drawn from all the other parts of the deed, taking the whole together ?

Sir Thomas White ought to be considered as a party to the

deed, for though not named as one, he executed it. The deed mentions, as far as I have read, that Bristol had received 2,000*l.* of Sir Thomas White (whether the fact was so or not, it must be taken to have been so,) *for the purpose of applying it for the benefit and welfare of the city of Bristol, and upon the uses, &c. thereafter-mentioned; and this deed, which was executed in the 8th of Elizabeth, 1566, mentions, that of that sum, they had laid out, in the 34th of Hen. VIII., so much as had purchased land of the clear yearly value of 76*l.*; but neither this deed, nor any charge in the information, inform me how that 76*l.* had been applied between the 35th of Hen. VIII. and the 8th of Elizabeth; whether, during this period, Bristol had taken all those rents to its own use, or whether all or any of them had been applied to any other uses, does not at all appear. I mention it for this reason, the Corporation of Bristol, in the 8th of Elizabeth, are in possession of an estate of the yearly value of 76*l.*, purchased, as this deed must be taken to express on all sides, with money which was part of the money advanced by White: being in possession of that property, in what manner it was enjoyed might be a very material circumstance to learn and to know in an information case, because if for instance, in the 34th of Hen. VIII., White had advanced the whole 2,000*l.*, and in that year it had been laid out in the purchase of lands of the value of 120*l.* a-year and more, instead of 76*l.* only; and if, between that time and the 8th of Elizabeth, they had had the ownership, and the beneficial ownership too, you must consider what is to be the effect of a deed when they were declaring a trust of property, which they had enjoyed prior to that declaration of trust, and what is to be the effect of an instrument containing these words, “uses aftermentioned,” and no other, where you are obliged to admit, that part of the surplus beyond the 104*l.* is to be applied to uses not declared at all. It would be material to consider what is to be the effect of a declaration of trust, made by persons in the actual possession of property, to which the *declaration of trust applies, as capable, or not capable, of being contradistinguished from a declaration of trust, made by a person who is receiving the estate under the grant and gift of another at the time he makes the declaration of trust. In the

ATT.-GEN.
v.
MAYOR OF
BRISTOL.

[*325]

[*326]

ATT.-GEN.
^{v.}
 MAYOR OF
 BRISTOL.

one case, the property being in the individual at the time, the uses to which it is to be applied must be regulated in some measure by that fact; and in the other, (being a case where, putting charity out of the question, it is taken by grant at the time, and the use does not comprehend the whole beneficial interest,) he who is taking, could not take what the other would retain in the case I before put.

The deed then goes on to state, that the Mayor and Corporation of Bristol, within the space of four years, were to purchase lands, which, together with those purchased, were to amount to the clear yearly value of 120*l.* and more, over and above all yearly charges and reprises, to be applied to the uses after-mentioned (I apprehend uses here merely mean the same as intents and purposes,) and that the rents of both are to be employed in manner therein specified; and then follow these words, "and to no other uses, intents, or purposes." But though these words are here inserted, the question upon the whole deed will be, what you are to do, or what was the intention of the author of this deed to do, with rents and profits not given to the uses after-mentioned? Now to get at that question, see what they are to do; they have four years to purchase land; a particular distribution is directed during eight years; a particular payment is directed in the ninth year; I doubt whether there is to be any payment at all in the tenth year; and then when you come to look at all the clauses following the enumeration of the different cities mentioned in the deed, and to consider

[*327]

their effect, the question is, *whether it is not the fair construction of this deed to say, that, although you ought to be beat out of the construction which arises out of those plain words, "to no other use," yet, if you find, from the whole frame of the instrument, you cannot give that effect to them which they might have in other cases, it becomes a question of intention, which you must collect from the whole deed; and, if the intention is, that they should not have that large effect now contended for, is it not the true rule of construction to give them the effect which they ought to have by considering all the parts of this deed taken together?

At this time, that is, when the first payment of 100*l.* was to be

made, lands were purchased producing 76*l.* per annum, and no more; that being the case, there are four years, within which they are to make up the purchase to 120*l.*, and more; four years' time is given, during which, however, they are to pay to these young men 100*l.* per annum. Now, if you are to consider, in a court of equity, that the 120*l.* per annum, and more, had been bought immediately after the execution of this deed, and the question had arisen, not in the year 1820, but in the year 1567, what was to be done with that 20*l.* *ultra* the 100*l.* which was to be thus paid, or with the excess, if it was more than 120*l.*, as in all probability would be the case, if you could take notice of what passed in the former suit, the question would have been the same in 1567 as in 1820. You cannot look at this deed, and say, from any expression in it, what is to become of this sum, if you look to no other use, intent and purpose, than what is there expressed; there is none expressed with respect to that 20*l.* In the whole of the argument on the other side, you are driven to admit this; and, in any way of putting it, it can only be contended, that the Corporation of Bristol were to be trustees in this sense, that they were to retain *16*l.* for repairs and charges, and to distribute the other 104*l.* One observation on that is, that during eight years, it was not 104*l.* that was to be distributed; another is, that, during the time that Bristol is to take any thing, there is nothing about 104*l.* Then it is said they are to take 16*l.* for repairs; and, in the latter case, it is not unfit that they should have 4*l.*, like the other corporations, for their pains. But that argument fails again, because, if that is the sum which is to pay the other corporations for their pains and trouble of distribution amongst their own bodies, we are to remember, that Bristol has trouble with respect to all these corporations; and if 4*l.* is a proper remuneration for what is done by York or Canterbury, it cannot be a proper one for Bristol, which is to be at much more pains and trouble, besides being subject to pains and penalties. Then, at the end of eight years, they are to find a fund to the amount of 200*l.*, for the purchase of corn, to be afterwards sold; and it would seem, according to the expressions, that the ninth year only was given them for that purpose. It may, however, I think, be argued, that it was to be supplied to the ninth and

ATT.-GEN.
 v.
 MAYOR OF
 BRISTOL.

[*328]

ATT.-GEN.
v.
MAYOR OF
BRISTOL.

tenth year, or that it might be divided between them ; but then, in point of construction, it must be recollected, that, in the first ten years, they were not to distribute 104*l.*, and that, with respect to the first four years, 100*l.* was to be paid, although 120*l.* a-year had not been then purchased.

[*329] The next part of this instrument is that which devotes a sum of 104*l.* to York, and the other cities and towns after-mentioned ; and here it certainly expresses, that it is to be paid out of the rents, issues, and profits. With respect to almost every one of the other corporations, it is not expressed that it is to be out of the rents, issues, and profits ; but I think that the passage at first ought, (subject to an observation which has been made upon *the subsequent covenant, which does not mention rents,) to be considered as governing the payments afterwards to be made, and as settling the fund out of which they are to come ; and I will take it so. Then come the different corporations in rotation, until you come back to Bristol, and there the 4*l.* is merged in the surplus, as well as the 16*l.* In this clause relating to Bristol, I observe the word “ assigns ” is used. I think with *Mr. Wetherell*, that it would be too much to say it meant assignees of the property.

The next clause is that which begins the rotation again, and then follows this clause, which I think is very material, and, if I am mistaken in my judgment, it is fit it should be known that I think it material. Upon comparing this deed with the clauses in the *Coventry* deed, I find that the latter contains only the common indemnity-clause, which every conveyancer puts into these deeds. The clause I have alluded to is, that which relates to the penalty ; if the land was to be worth 120*l.* a-year only, it is a little difficult to see how the Corporation, in some instances, could find so much money ; if, on the other hand, the land was to be their own, with the improvements upon it, there would not be any reason why they should not forfeit at least to the extent of the increased value. But the more material observation is this, that these fines are to be paid not to the persons who receive the 104*l.*, but to St. John's College, and the college are to hand over the 104*l.*, and to take the residue of the fines for their own use and benefit. It is very singular, if it was at all in the

contemplation of the author of this gift (who does not exhaust all the 120*l.* or more at the time he makes it,) that the increased revenue was to go to the charities, that he should have gone on to say, you shall pay these fines to St. John's College; so that, although the estate produces more than 150*l.*, this sum only is to be paid to St. John's; and the *other cities and towns, instead of taking an increase, must be content with receiving the 104*l.*, the college retaining the difference between that sum and 150*l.* This can hardly be contended; but you must either go that length, or say that the true intent and meaning of the deed was, that if the sum to be paid to York or Canterbury was 200*l.* (which by the increase of the rents might be the case,) and there was a default in payment, St. John's was to hand over the whole to them, but would be entitled, if it was only 120*l.*, 130*l.*, 140*l.*, or 150*l.* a-year, to retain all above 104*l.*; and if a proportionable increase is to be provided for by the Court, you must somehow or other get at the means of giving St. John's a proportion of that increase, regard being had to what York and Canterbury took under this deed, and what they would take by virtue of that increase.

Another very material clause is that of indemnity; and although this deed does furnish the argument which has been so strongly pressed, as arising out of the covenants, which it is said are to pay out of the rents only, and although it must be admitted, if there was no clause of this nature, the Corporation would have a right to be indemnified in the same manner as all other trustees; yet the question here is, regard being had to the fact, that the estate is stated by the author of this deed to be worth 120*l.* and more, when not more than 104*l.* is to be distributed; and regard being had to the clause in which it is specially provided for what species of loss they shall be indemnified, whether it was not meant that it was that species of loss, and that only, that they should be able to state, as a ground for not making the specified payments; or, in other words, whether it was not considered and agreed, that they would have revenue enough,—rents, issues, and profits enough,—to make the payments; *and whether it was not at the time agreed, that it should be understood, that they would have enough, unless deprived of some of

ATT.-GEN.
 v.
 MAYOR OF
 BRISTOL.

[*330]

[*331]

ATT.-GEN.
v.
MAYOR OF
BRISTOL.

the rents in consequence of the events mentioned in this special clause, and that they were not to be indemnified against insolvency of tenants, or low rents, or the expenses of recovering them, or other events not expressed in the deed, which from the beginning says nothing about the 16*l.* going for repairs. The clause in question says, that if the estates should be notoriously decayed by any sudden misfortune, by reason of fire or other like occasion, that then, and from such time of such decay, &c. the payments should cease, &c. ; and then comes the clause which says, that when the rents again increase, the deficiency arising from that particular species of decay is, when the rents admit of it, to be made good. . Then you see they are not treated as trustees to all intents and purposes, and they have not, as it appears to me, a right to claim all such allowances as general trustees would have a right to claim ; and this clause furnishes an observation upon one of those *indicia* of intention which is alluded to in all the cases, namely, that the testator must mean, that those who lose by the fall shall gain by the rise, because here they are not to bear the losses unless they arise from these particular causes, and if a deficiency does arise from them, they are not to have all the future rents, but the charge only is to be made good ; it is the most difficult thing in the world, when considering this clause, to suppose, that if the rents amounted only to 120*l.*, only 104*l.* was to be made good, but that, if they exceeded that sum, the increased rents, whatever might be their amount, were to be divided in the proportions of 104*l.* to 120*l.*

[*332]

Then the question comes to this at last, taking *the whole deed together, seeing that it is a case in which the value at the time was more than was distributed at the time, and in which the increase and decrease in value is regulated by a special provision, and recollecting that there is not one single case,—at least I have not been able to find one,—where the doctrine to be found in the *Thetford* case has been applied, except where the value, or what was represented to be the value at the time, has been distributed at the time, and recollecting, that Bristol was a material and prominent object of the bounty of the author of this gift, is this not a case which falls within the range of those cases in which property given to a corporate body, is given to it

subject only to the charges imposed, and not as a mere trustee, entitled to no other benefit than what is expressly given to it in distribution, and entitled to all the indemnities of trustees, *ultra* those expressed and pointed out in the clause in which they are given? Upon the best judgment I can form, and laying out of view everything but the question, whether this deed appropriates the surplus rents to these charities, I am of opinion, that they cannot, under the effect of this instrument merely, call for a distribution of the surplus. My judgment may be set right elsewhere, or the case may be reheard; but that is my opinion upon the effect of this deed, and the consequence is, that by putting some special words into the order, it does appear to me, this

ATT.-GEN.
v.
MAYOR OF
BRISTOL.

Demurrer ought to be allowed.

* * * *

CUMMING v. FORRESTER.

(2 Jacob & Walker, 334—346.)

A. and B. join in a petition to the Crown, representing an estate to have escheated, and procure a grant of it to be made to them: Held, that A. could not afterwards set up a claim to one part under a prior title in himself, while taking the benefit of the grant as to the rest.

A Crown grant made under a mistake may be recalled irrespectively of any derivative title dependent upon it. Hence it seems that such a grant could not effectually raise a question of election; but a person applying for and claiming under such a grant cannot (so long as the grant remains) dispute its application as to part of the property comprised therein to the prejudice of others who claim thereunder.

JOHANNA BARE of Calcutta being, in January, 1788, about to intermarry with Thomas Lee, by indentures of lease and release of the 15th and 16th of that month, conveyed and assigned to trustees certain real and personal property, upon trust, for her separate use for her life, and, after her death, upon trust, as to a freehold upper-roomed house, in Cossitulah Street, Calcutta, marked No. 6, to convey the same to her natural daughter Fanny, the wife of Robert Cumming, and the heirs of her body; but, in case of the death of Fanny Cumming, without issue, then immediately after her (Johanna Bare's) death, to convey it

1820.
Dec. 11.

Rolls Court.
PLUMER,
M.R.

[334]

CUMMING v. FOREMSTER. to Thomas Lee, in fee; and, as to the other freehold premises, upon trust, for Thomas Lee, in fee, in case of his surviving her, with a power of revocation and new appointment over the last-mentioned premises.

The marriage took effect, and Lee afterwards died in March, 1797, leaving his wife surviving; and, it being imagined, that by that event, it was become unnecessary to preserve the trusts of the settlement of 1788, the surviving trustee, by indenture, dated the 10th of November, 1797, reconveyed all the property comprised in the settlement to Johanna Lee, to hold, as of her former estate.

[*335] Fanny Cumming died in the lifetime of her mother, leaving one son, Robert Cumming, and one daughter, C. I. F. Cumming, the plaintiff, both infants, surviving her. Johanna Lee, by her will, dated the 16th of September, 1802, devised her property, amongst which she mentioned her two upper-roomed houses in Cossitulah Street, to be sold, and, after payment of her funeral charges and legacies, the residue to be divided into two equal shares, one *of which she gave to her grandson, R. Cumming, when he should attain the age of twenty-one, or marry, and the other to her grand-daughter, the plaintiff, with a proviso, that, upon her marriage, it should be settled on her and her children. This will was attested by two witnesses only,† in consequence of which, upon the death of the testatrix, in October, 1802, without any lawful issue or heir, it was conceived that the real estate, comprised in the will, escheated to the Crown.

The bill stated, that the plaintiff and her brother, Robert Cumming, having both attained the age of twenty-one, in the year 1808, presented a memorial to his Majesty, and afterwards, in January, 1813, a petition, stating that Johanna Lee was seised in fee-simple of all the premises above-mentioned, and that in consequence of the defective attestation of her will they did not pass, and praying a grant of them upon the trusts of the will. In consequence of this petition, by letters patent, dated the 26th of June, 1813, reciting the will and death of Johanna Lee, and that his Majesty had been advised, that her will was not by law

† See *Gardiner v. Fell*, 20 B. R. 208 [and note at foot of p. 208] (1 J. & W. 22).

CUMMING
v.
FORRESTER.

valid for the purpose of passing her real estates, and that on her death without heir, the said hereditaments escheated to the Crown, all the said hereditaments specified in the said devise, and intended for the benefit of the said Robert Cumming and the plaintiff, were granted to A. Colvin and G. Cruttenden of Calcutta, their heirs and assigns, upon trust to sell, and after payment of such part of the funeral charges of Johanna Lee as might remain unsatisfied, to pay over a moiety of the residue of the proceeds to Robert Cumming, for his own use and benefit, and to remit the other moiety to Messrs. Reid and Palmer of London, merchants, who were to invest it in the funds, or upon real security, and *to stand possessed of it, upon trust, for the separate use of the plaintiff for her life, and after her death, upon trust, for her children who should attain twenty-one, or marry, and for want of such children as she should appoint, and in default of appointment, for her next of kin.

[*336]

Previously to the date of the letters patent, the executors of Johanna Lee, conceiving that, under the settlement, Robert Cumming was entitled to the house No. 6, Cossitulah Street, had delivered it up to his agents in India, who sold it in July, 1812, and remitted the proceeds, together with the rents received since the death of the testatrix, to Robert Cumming. The remainder of the property was afterwards sold, in March, 1815, in pursuance of the letters patent, by A. Colvin. Robert Cumming had in the mean time become bankrupt, and Colvin gave credit to his assignees for a sum of 1,384 rupees, which, together with what he had himself previously received from the house No. 6, amounted to one half of the proceeds of the whole of the property; the other half, amounting to 7,048*l.*, he remitted to Messrs. Bruce, Bazett & Co. of London, with directions to pay it to the plaintiff, if under the letters patent, she was entitled to it. The assignees of Cumming making a claim to one half of this sum, Bruce, Bazett, & Co. declined paying it over to the plaintiff or her trustees; and the bill was in consequence filed, praying that the plaintiff might be declared entitled, and that it might be invested upon the trusts declared in the letters patent, for the benefit of herself and her children. The bill insisted, that the assignees were precluded, by the representations made

CUMMING by Cumming in the memorial and petition, from availing
 FORRESTER. themselves of his right to the house No. 6, under the
 [*337] settlement of 1788 ; or that, at *least, they were bound to
 elect between that right and the benefits given him by the letters
 patent.

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Mr. Horne, Mr. Heald, and Mr. M. West, for the plaintiff.
 * * *

*Mr. Roupell and Mr. Spurrier for the defendants the
 assignees :*

* * Election proceeds upon a supposed intention of the
 grantor or devisor, which creates an implied condition. But the
 Crown could not intend to part with that which did not belong to
 it: the Court cannot impute the same intentions to it as it would
 to an individual.

[341] THE MASTER OF THE ROLLS :

[*342] The difficulty I have felt has been upon a subject not much
 pressed by either party, relative to the rights of the *Crown, and
 the effect of a Crown grant being made under a mistake. But I
 shall be glad to be relieved from this, and it is not the interest
 of the parties to turn the plaintiff round upon this point, which
 would only render it necessary to apply for a new grant. I would
 rather consider the case upon the merits, freed from this difficulty,
 and from the jealousy with which the law regards questions
 involving the rights of the Crown. The power of calling back its
 grants when made under mistake, is not like any right possessed
 by individuals ; for when it has been deceived, the grant may be
 recalled notwithstanding any derivative title depending upon it ;
 and those who have deceived it must bear the consequences.
 But that is foreign to the merits : the parties do not wish to raise
 the objection, and I do not feel bound to raise it ; for it is not a
 case where the Crown has any substantial interest ; if it had,
 the Court would protect it, and would require that the *Attorney-
 General* should be made a party. But in the view taken of
 it by the parties, it may be considered as a question of private
 right.

Now, in that view how do the circumstances stand? Before Johanna Lee made her will, it was imagined that, in the events that had happened, the trusts of her settlement had ceased; and it is admitted that under that impression the surviving trustee had reconveyed to her all the property included in the settlement, treating it as hers absolutely. I think we must understand the reconveyance to have proceeded on that idea. She made her will five years afterwards, devising her houses in this street; and I think it is clear, that at that time she supposed her right to extend to the whole property, and made her will in that persuasion. A point was ingeniously suggested, that it might be understood not to pass the whole, as it might be her intention to give only so much as she had a right to. But that could not be, for it is evident *that she must have considered the whole to be hers, the reconveyance being made on that supposition. If she had any idea of an invalid title to one house, it is impossible to suppose that she would have given them to her grandchildren in this manner, shewing her intention that they should share equally, when the result would be, that Robert Cumming would take the whole of that one house, and would then take a moiety of the rest. What equality would that be? She must have intended the will to operate upon the whole property as hers: the words are so: she gave two houses in Cossitulah Street; and it is not suggested in the answer, that she had more than two, or that this house, No. 6, was not one of them. If this will had been properly attested, there can be no doubt that the consequence would have been, that Robert Cumming must have elected; he must either have renounced his right under that settlement, or have given up the benefits conferred on him by the will. But this instrument was invalid, and could not, therefore, have the effect of putting him to his election; for we are now treating it as real estate, which it appears to have been considered all along.

CUMMING
v.
FORRESTER.

[*343]

In 1808 the memorial was presented, representing that there was an escheat; and as the case now stands we must take it as a fact, without entering into the niceties of the law of India, that it did devolve upon the Crown. The memorial and petition are in the joint names of Robert Cumming and his sister, and pur-

CUMMING
v.
FORRESTER.

[*344]

ports to be presented by both of them ; they were both adult and competent to dispose of whatever interest they had. I think they have admitted the fact of his concurring in the memorial and petition ; and it appears in evidence, that he paid his share of the expense ; and he had given to his sister a power of attorney to act for him. I must take it, on the facts stated, that he was *privy to and approved of the steps taken in his name to procure a grant. The petition represented, that the whole was vested in the grandmother, not mentioning that there was any other title : there is no suggestion of any right interfering with that of the Crown. Why should he suppress it ? Is it possible that, after concealing his title from the grantor, he can be allowed, in a court of equity, thus to set it up again ? His concurrence in the application must be considered as proving that he meant to relinquish any interest he might have under the settlement. His keeping it out of the view of the Crown would have been a most unfair proceeding, if he had meant afterwards to take advantage of it.

[*345]

Under a persuasion of the correctness of the memorial, the Crown grant is made in 1813, comprising the whole property, and adopting all the limitations of the will, and I do not see any act of Robert Cumming's to interfere with it. What was done in India was not by him, but by his agents and attornies, without his knowledge. They sold the house, but it does not appear that he was aware of it, as it was about that time he gave the power of attorney. It does not, therefore, appear that he meant or ever thought of making any adverse claim. He afterwards becomes bankrupt, and his assignees now make this defence, being bound, for the sake of the creditors, to do the best they can. The house No. 6 was sold, and the proceeds paid to Robert Cumming : the rest of the property has also been sold, part of the proceeds paid to the assignees, and the rest paid into Court. The plaintiff calls on the assignees to elect, whether they will take by the grant under the common grantor, or will give up that title, and claim under the settlement. It is certainly contrary to every principle of equity for a person to induce a gift to be *made to himself, and another in moieties, and then to set up an adverse claim to a part. On the plainest principles of morality and

CUMMING
C.
FORESTER.

justice that cannot be permitted. There is here a feature in addition to the ordinary cases of election, the party himself having co-operated in inducing the Crown to make this grant. That circumstance does not occur in general with wills and deeds; though they are made without the knowledge of the party, he is put to his election; for it is now established, that the doctrine of election extends to deeds. But here the grant was made with his approbation: he informed the Crown that the property had escheated. It is impossible to say that this party, having, by his representations, induced the Crown to make this grant to him, can set up a title against it. It would be contrary to all analogy to the doctrine of election. The assignees certainly cannot establish the right that they contend for.

I felt a difficulty as to applying the doctrine of election to the Crown; for the Crown being always in existence may always be applied to, to set right the grant; and if the party elects to renounce what the grant has given him the consequence is, that as to that part the grant does not take effect; and then, does not that part revert to the Crown? Can the Court take hold of it to make satisfaction to the other? That is my difficulty; but it would not benefit the assignees; for it is impossible that they could be allowed to participate in the fund in Court, without bringing into the account what they and the bankrupt have received.

I think it beyond a doubt that the intention of the testatrix was not to devise it as a trustee, but to give specifically this house, No. 6, and that the design of the *Crown was to make a grant co-extensive with the will, comprising this house. It is not like the case of *Read v. Crompt*† that was cited; for there the Court could restrain the will to the part that was surrendered, considering from the language the testator had used, that he did not intend to devise that which he had not surrendered; but that fails of application here, where in the will and the letters patent there is express mention of the two houses. It will probably not be the interest of either party to press any points of form: there might have been great difficulty, with respect to the Crown, on the question, whether the Court could dispose of the property

[*346]

† 1 Br. C. C. 492.

CUMMING without a new grant being made; but that is a point not
 v. raised by the parties, and I do not feel it necessary to raise
 FORRESTER. it myself.

The assignees electing to take a moiety of the whole produce,
 the decree declared that they were entitled accordingly.†

1820.
 Dec. 15, 16.

Lord
 ELDON, L.C.

[349]

GOODHART v. LOWE.†

(2 Jacob & Walker, 349—352.)

An injunction to restrain the sailing of a vessel, containing goods sold to a person who had become insolvent, but over which the plaintiff retained a right of stoppage *in transitu*, refused, on the ground of the possible injury to other persons interested in other goods on the same vessel.

THE plaintiff contracted to sell to the defendant Lowe, twenty-five hogsheads of sugar for exportation, and to deliver them at the warehouses of the London Dock Company, to be shipped on board a vessel provided by the defendant. It was agreed that the plaintiff should pay all expenses that might be incurred before they were shipped, and that the purchase-money should be paid by the defendant upon the shipment, and before the vessel sailed. The sugars were accordingly *delivered at the company's warehouses, and receipts were given to the plaintiff by the warehouse-keeper: at the request of the defendant, they were afterwards, by an order from the plaintiff, shipped on board a vessel of which the defendant Longridge was master, and the officer of the company took a receipt from the mate for them as coming from the plaintiff. The defendant Lowe became insolvent, without having paid for the goods; and the vessel being upon the point of sailing, the bill was filed, praying that they might be delivered to the plaintiff, and that Lowe and Longridge might be restrained from dispatching the goods beyond the seas; it also prayed an injunction to restrain the Dock Company from permitting them to be removed from the docks, and a writ of *ne exeat regno* against Longridge.

The bill being supported by an affidavit, a motion was now

† Reg. Lib. A. 1820, fol. 641.

shire Ry. Co. (1867) L. R. 2 Ch. 332.

† *Schotemans v. Lancashire & York-*

made for the injunction : the motion had been previously made before the VICE-CHANCELLOR, who refused it.

GOODHART
c.
LOWE.

Mr. Wetherell and *Mr. Stephen*, in support of the motion, insisted that the delivery of the goods was not complete, the orders being given and the receipts taken in the name of the plaintiff. It is a general rule, that the delivery is incomplete until the bill of lading has been signed and given by the master. In *Craven v. Ryder* † it was held, that a person who had sent goods by his lighterman to be shipped on board a vessel retained a right to them, until the lighterman's note had been exchanged for the bill of lading. It was also stated to be the custom of the company to consider the *delivery as not complete, until the vessel had got out of the docks. [*351]

THE LORD CHANCELLOR :

There are customs regulating lightermen in the Thames, which do not apply to ships going abroad. I am asked to stop a vessel which is to sail to-morrow, when the propriety of doing it involves the discussion of much special law as to delivery ; besides, it is not usual, in equity, to stop goods *in transitu*. I do not think I can grant the motion, but I will let you know to-morrow.

THE LORD CHANCELLOR :

Dec. 16.

There is a great distinction between a delivery to a lighterman, and on board a ship.‡ If the plaintiff has a right to the goods, he may lay his hands upon, and recover them, if he can ; indeed, *BULLER, J.* used to say, by any means, short of felony. But if a ship contains a cargo belonging to twenty-four persons, and *A. B.* has a right to part of it, am I, because he may bring an action of trover, for the conversion of his property, to stop the ship from sailing with the goods of the other twenty-three ? Consider the danger of interfering ; if, instead of this valuable cargo, there were only a single hogshead, the effect would be the

† 16 B. B. 644 (6 Taunt. 433 ; 2 Marsh. 127). that the goods were delivered on board the ship.

‡ In *Craven v. Ryder*, it appears

GOODHART ^{v.} LOWE. same. There is no instance, that I recollect, of stopping *in transitu*, by a bill in equity; there have been many cases, where questions have arisen respecting the property of the ship itself, in which the Court has interfered; but I do not remember one of stoppage *in transitu*.

[352] *Mr. Wetherell* then suggested, that the captain might be ordered not to part with the goods; or some order might be made which would protect the plaintiff's property in them.

THE LORD CHANCELLOR :

I do not think I can do that. Why did you part with your property without obtaining payment? But what has passed shall be without prejudice to any such application. I incline to think, that the delivery in this case was not complete; but then it comes to a case of a stoppage *in transitu*, and if persons chose to part with their property under circumstances to which that right applies, the question is not, whether they may not act upon that right, or enforce it at law, but whether, in every such case, they are to have relief by a bill in equity. My objection goes to this, that, where parties think proper thus to deal with their property, it is not my business to sanction it one way or the other; and it is too much to expect the Court to take care of the property of persons who will not take care of it themselves. The question is certainly a very important one; but it would be very dangerous for this Court to assume a jurisdiction to stop *in transitu*.†

Injunction refused.

† See Lord Cairns's observations upon this point in *Schotemans v. Lancashire and Yorkshire Ry. Co.* (1867) L. R. 2 Ch. at p. 340.—O. A. S.

THE ATTORNEY-GENERAL *v.* HARTLEY.

(2 Jacob & Walker, 353—386.)

The master of a free school was appointed by the persons acting as trustees, and acted as a master for many years: Held, that if he has, since his appointment, duly performed the duties of the office, the validity of his appointment cannot afterwards be questioned.

The master of a free grammar school is permitted to take boarders to be educated in the school, but not so as to prejudice the free scholars.

Several donations partly for the support of a school, and partly for the support of a grammar school, being devoted by the commissioners of charitable uses in 1623 to the maintenance of a grammar school, and that decree having since been followed, the whole revenues must be applied to the use of the grammar school, at least during the continuance of a master appointed under the present system.

Although in a charity case the proper relief may be granted, though not prayed for, yet the state of the record is to be considered with reference to the question of costs.

There is no incompatibility in the offices of master of a free grammar school and vicar of the parish.

A COMMISSION of charitable uses, bearing date the 8rd of July, 1622, having issued into the West Riding of the county of York, an inquisition, bearing date the 2nd of May, 1623, was taken under it, by which the jurors found, and presented to the following effect :

They first found, that a parcel of land, in the parish of Bingley, was, in the year 1529, conveyed to trustees, in trust, for the finding of a schoolmaster, to teach grammar, within the town of Bingley, for ever ; that several houses in Bingley, with some lands belonging to them, had, together with all the rents, issues, and profits thereof, from time out of mind of man, been assigned, limited, used, and employed, for, and towards the maintenance of a schoolmaster, teaching grammar within the said town of Bingley, and that three yearly rent-charges of 13*s.* 4*d.*, 12*s.* 4*d.*, and 6*s.* 8*d.*, had, in the year 1570, been granted to trustees, upon the same trusts. They then set forth the several documents following: A feoffment, dated in 1602, of a tenement and the appurtenances, in trust, that the rents and yearly profits thereof should, from time to time, for ever, be employed for the maintenance of a schoolmaster, teaching grammar within the said town of Bingley, or to such other godly uses as should be thought most meet for the good and common

1819.

Dec. 14, 15, 16.

1820.

Jan. 12, 14, 25.*Dec.* 18.

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Lord

ELDON, L.C.

[353]

ATT.-GEN.

HARTLEY.

[*354]

profit of the town and parish of Bingley, and to no other use, intent, *or purpose, whatsoever. A conveyance, dated in 1605, of a messuage and premises to feoffees, to the intent, that the yearly profit of all the said premises, should, yearly, from time to time, be distributed, for the maintenance of a schoolmaster, teaching grammar within the said town of Bingley, or to such other good and godly uses as should be thought most meet for the good and common profit of the town and parish of Bingley, at the discretion of the feoffees, and to no other intent. A conveyance, also dated in 1605, of a house and lands belonging to it, to the same persons, in trust, for the maintenance of a schoolmaster, teaching grammar in the said town of Bingley, for ever. And lastly, a conveyance dated in 1617, and made in performance of a decree of the Court of Chancery, of about sixteen acres of land, to the intent and purpose, that the rents, issues, and profits, should be employed by the feoffees, and their heirs and assigns, to the use of the poor people of Bingley, and towards the maintenance of a schoolmaster, in the same town of Bingley, for ever, according to the last will and testament of William Wooler, deceased, and of his intent and meaning therein declared. The will of William Wooler referred to, dated in 1597, directed, that 50*l.*, or thereabouts, should be bestowed on two closes, near unto Bingley, to the end, that the poor of Bingley might have their kine grassed in summer, at the half rate, and the money for the grass to go towards the maintaining of a school at Bingley, for ever, at the discretion of four of the honest men of the town; but Mr. Walter Currer was to have the placing of a schoolmaster, so long as he lived.

[*355]

The inquisition next stated, that all the said lands, or the rents, issues, and profits, thereof, had been theretofore used and employed to the several and respective uses for which they were given, or had otherwise been *limited or appointed, and then, after mentioning that Michael Broadley, by will, dated in 1618, gave to the school of Bingley 40*l.* to be disposed of at the discretion of Nicholas Walker and Thomas Howgill, the schoolmaster, his executors, and to the poor of the parish of Bingley 40*s.*, proceeded to find, that for the space of eighteen years then past, or thereabouts, a schoolmaster, for the teaching of the grammar

unto the children of the inhabitants of the said town and parish of Bingley, had been kept and maintained in the said town of Bingley, according to the intents of the several gifts aforesaid, and that the said Thomas Howgill had been schoolmaster there for the space of nine or ten years then past, and having then lately obtained the vicarage of the church of Bingley aforesaid, and being incumbent there, had, in respect of his charge of that, and for other causes and reasons, declared before the commissioners aforesaid, at the time of taking that inquisition, relinquished and surrendered up his said office and calling of schoolmaster of the said school of Bingley, whereupon the said feoffees for the said school had proceeded in making choice, upon their liking, of a schoolmaster of the said school for the time present.

ATT.-GEN.
v.
HARTLEY.

The decree of the commissioners, made in pursuance of the commission and inquisition, contained several orders for the regulation of the charity. First, thirteen persons were named, who were, during their lives, to be the sole committees for all the said charitable uses, and they, or such others as should succeed them in their places, or the greater number of them, were to have full power to receive the rents and profits of the said lands and hereditaments, and the stocks, sums of money, debts, and other chattels, given or limited to the said charitable uses, and to dispose of them for the several *and respective uses to which they were limited or given; all persons who were seised of any of the said lands, were upon the request of the committees, or any four of them, to convey to the committees and their heirs, and the tenants and owners of the lands, charged with any of the said rents, as also the tenants and farmers of the lands, &c. given to the said charitable uses, were to pay the rents to the committees, or such four of them as on that behalf should be nominated by all of the committees for the time being, or the greater number of them; and the persons in whose hands any of the said stocks or sums of money might be, were to pay them to the committees. No leases were to be made for any term greater than twenty-one years, or in reversion, or without impeachment of waste, and so much rent and yearly profit at the least were to be reserved as any man should or would *bonâ fide* give, for the payment of which sufficient security

[*356]

ATT.-GEN. and caution was to be taken; the said stocks were to be pre-
v. served entire, and the profits and yearly advantage arising there-
HARTLEY. from to be bestowed to the uses to which they were given.

Secondly, the thirteen committees were every year to elect four of their number to be their stewards or bailiffs, to receive the rents, &c. and to cause them to be disposed of for the said respective charitable uses; at the end of the year, they were to render accounts to the other committees, which were to be entered in a book provided for the purpose; the book was to be kept in some safe and convenient place within the parish church of Bingley, under two locks and keys at the least, one of which keys was to remain with such one of the said committees, as the rest or greater number of them should nominate, and the other with the vicar of the church of Bingley for the time being.

[357] Thirdly, if any of the committees should die, or depart out of the country, or give up his place, or should appear in any sort to be unfaithful, or otherwise unfit or unworthy of the said place, then the residue of the committees for the time being, or the greater number of them, first deposing and removing the said unfit and unworthy persons, were to elect and choose some other fit person or persons in their place, to make the full number of thirteen committees; and the person or persons so departing, or leaving his or their place or places, or being deposed, were to release his and their right and title, in and to the said lands and premises, so as always the whole right and estate of all the said lands and premises might remain, and be in the said committees.

Fourthly, The inheritance and estates of the said lands were to be always so ordered and disposed of by renewing of feoffments thereof unto the said uses, as that the same might always be in all them, the said committees, or in eight of them at the least.

And for as much as by the inquisition aforesaid, it appeared, that all or the greater part of the said lands and premises, were given and limited for the finding of a schoolmaster, to teach grammar in the said town of Bingley, and for that these were not laws or directions given by the said founders, either for the election or provision of a schoolmaster, or for the ordering

ATT.-GEN.
v.
HARTLEY.

and government of the said schoolmaster and school ; so that, without some convenient course and provision in that behalf, the said lands, rents, and profits, would be utterly misemployed, or not employed according to the intent of the founders. It was, fifthly, ordered and decreed, that the said thirteen committees taking unto them some two or more learned and sufficient teachers within the said West *Riding, should, from time to time, so often as need should require, have power to elect, and nominate, and place a fit and sufficient person to be a schoolmaster of the said school ; and it was declared, that such one only was fitting for the said place, as should be found first to be soundly and substantially grounded in the Christian religion established in this realm, and able and willing to instruct his scholars in the same, free from all points and tenets of popery ; he was to be of a virtuous and reformed course of conversation, no light or disordered person, industrious and diligent in teaching, and moderate and discreet in his correction ; and if, after he should be placed in the said place and room of a schoolmaster, he should prove to be idle or negligent, or anyways unfit and unworthy of the said room and place, then the said thirteen committees, together with two such preachers as aforesaid assisting them, should have power to remove and put out the said schoolmaster from the said place, and to choose another in his room. And whatever the said thirteen committees, or the greater number of them, together with the said two or more preacher's assistants, should determine and do, either in the election and placing, or removing and displacing of the said schoolmaster, should stand firm and good, as if the same had been done by their unanimous consent and agreement.

[*358]

Sixthly, The said thirteen committees, assisted by two such preachers as aforesaid, were, for the better education, order, and government of the said schoolmaster and scholars, to cause, and procure laws to be gathered and selected out of the laws of the schools of Queen Elizabeth at Wakefield, or of the school at Sedburgh, or any other schools where they should find any good laws established, in that behalf, or such other directions as might best serve for the ordering and government of the *said school of Bingley, which laws the said commissioners did limit

[*359]

ATT.-GEN. and appoint the said thirteen committees to see duly performed
 v.
 HARTLEY. and put in execution.

Lastly, The decree directed, that the thirteen committees should be allowed, out of the lands, rents, and stocks of money belonging, or limited to the said several and respective charitable uses, all such charges, as they should be put to in any suit or suits whatsoever concerning the same, together with all the charges of the commission, and the execution, return, and exemplification thereof, under the Great Seal of England.

By indenture of feoffment, dated the 13th of June, 1671, Samuel Sunderland conveyed several messuages, parcels of land and hereditaments, to nine persons therein named, and their heirs, to hold to the use of himself for life, and after his decease, as to part of the premises, to the use of the vicar of Bingley for ever; and as to another part of the said premises, to the use of the master of the Free Grammar School of Bingley aforesaid, lawfully licensed for the time being, for ever; provided that the same schoolmaster, for the time being, should pay out of the rents and profits of the said lands and tenements, the yearly sum of 4*l.* unto the usher master of the said school of Bingley, by equal portions, for ever; the said usher master to be nominated and elected by the upper master, and by the feoffees therein named, and their successors, or the major part of them, and lawfully licensed accordingly; and as to the remaining part of the said premises, to the use of the most indigent and necessitous poor people of the said township of Bingley. It was directed, that when the said nine feoffees should, by death, be decreased to the number of four, then these four should, within three months,

[*360]

taking advice of the vicar *or minister of the said parish church for the time being, elect, nominate, and appoint nine of the most able and discreet inhabitants within the said parish, and the four surviving feoffees were to convey the premises to the said nine inhabitants so then nominated and elected; and the survivors of them to stand seised thereof as feoffees in trust for the above uses. The feoffees were, from time to time, to keep the premises in good repair.

Under the above-stated decree and feoffment, a free school had, for a long period, subsisted at Bingley, for the regulation

of which, the present information was filed, at the relation of three of the inhabitants, against the Rev. Dr. Hartley, the schoolmaster, and the thirteen persons who were the present committees or trustees.

ATT.-GEN.
v.
HARTLEY.

The information contained a variety of complaints against the master and the trustees, relating both to the personal conduct of the former, and to the general management of the charity. It was represented, that a deviation from the ancient usage of the school had taken place, in excluding from the course of education, instruction in the English language, writing, and arithmetic, and, in admitting to the school, a number of boarders, living in the master's house, and foreigners, or children not born of parents residing in Bingley. The master who was appointed in 1791, had in 1797 been presented by Lord Loughborough, then Lord Chancellor, to the vicarage of Bingley. It was insisted, in the information, that these two offices ought not to be held by the same person. It also accused the master of neglecting the education of the free scholars, and exercising undue severity towards them; it was alleged that his whole attention was devoted to the care of the boarders, who were allowed greater privileges, and who, presuming on their rank in life, were in the habit of beating and ill-treating the other boys; the master was also charged with demanding money for the instruction of the free scholars. It was also alleged that the master had been suffered to have the entire management of the charity estate, that improper leases had been granted, that the directions of the decree, as to the annual election of stewards, had been neglected, and that no trustees had been regularly appointed of the lands given to the use of the charity, by Samuel Sunderland. The information prayed the appointment of a new schoolmaster and trustees, and that all improper leases granted by the defendants, the trustees or pretended trustees, might be set aside, and all other acts done by them contrary to the true intent of the founder declared void; that it might be decreed, that the school was, and ought to be conducted, in future, as a school for general education, open to all boys, children of the inhabitants of the parish of Bingley, without distinction, and that all proper directions might be given for the due regulation

[*361]

ATT.-GEN. and management of the said school, as a school for general
 HARTLEY. education, and that it might be declared, that no boarders or
 foreigners ought to be taken by the schoolmaster, or admitted
 into the school, and that proper directions might be given as to
 the regular appointment of trustees and stewards of the charity
 estates and funds, and of the usher or ushers.

* * * * *

[363] It appeared that the directions of the decree of 1623, and the
 feoffment of 1671, as to keeping up the number of trustees had not
 been regularly complied with. In the year 1815, there was only
 one surviving trustee of the premises given by S. Sunderland;
 he then appointed nine others to succeed him, and conveyed the
 charity estates to them. As to the other part of the charity
 property, the number of trustees of which was fixed by the decree
 at thirteen, the appointments had also been irregular, there
 [*364] having been six vacancies in 1772, and also, at *other times, less
 than the proper number; and on the nomination of new trustees,
 conveyances of the legal estate had not been executed. The
 same persons who were trustees of the premises given by
 Sunderland, had, in general, been also trustees of the other
 estates. The trustees had, in the year 1807, demised a part of
 the charity estates to Dr. Hartley, for twenty-one years, at 90*l.*
 per annum, which did not appear to be less than the real value;
 out of the rent, he was to retain 20*l.* per annum, to repay him-
 self a sum of 420*l.* expended by him in defending the title of the
 charity to a part of its lands.

The cause was heard on the 13th of December, 1818, before his
 Honour the VICE-CHANCELLOR, who was pleased to decree that it
 should be referred to the Master to inquire who are now the
 committees or trustees of the charity estates mentioned in the
 decree of the 2nd of May, 1623, and of the charity estates com-
 prised in the feoffment of the 15th of June, 1671, and in whom
 the legal estates are now vested; and the Master was to be at
 liberty to state any special circumstances respecting the trustees
 or the estates. It was ordered, that the Master should inquire,
 whether * * it was for the benefit of the free scholars that the
 schoolmaster should receive boarders for instruction, or other
 children, who did not partake of the benefit of the free school.

And whether the duties of the vicar of the *said parish of Bingley were inconsistent with those of the schoolmaster of the said school?

ATT.-GEN.
v.
HARTLEY.
[*365]

From this decree the defendants appealed, and moved to stay the proceedings pending the appeal. After hearing the motion at considerable length, the LORD CHANCELLOR directed the appeal to be set down, and it now came on.

Mr. Hart, Mr. Wetherell, and Mr. Spence, for the relators. * * *

Mr. Heald, Mr. Parker, and Mr. Skirrow, for the defendants. * * *

[367]

THE LORD CHANCELLOR [after stating the prayer of the information, and the decree, and after making some general observations on the decree, said:]

1820.
Jan. 26.

It is necessary to detail particularly the state of the record ; for though I admit (whether I admit it with regret is of no consequence) that, in a charity case, the Court may grant the relief that should have been asked, whether it has been asked or not, yet experience justifies me in saying, *that a more unwholesome principle could not be chosen, if it did not recollect that it must exercise a sound discretion, as to what is to be done in the matter of costs. Taking this case as an illustration, let us see how it would stand, if the Court does not take the greatest care as to the matter of costs. All the costs of these charity suits come out of the estate, that is, out of the estate of the master, a person who is only tenant for life : and can it be just that an information should be filed, involving most expensive inquiries, containing gross imputations on the conduct of individuals, and allegations not proved, upon which no relief has been given, or could be sought, and yet that the costs of all parties should be paid out of the fund which is provided for the annual maintenance of the master ? It cannot be just that such should be the rule, and I desire it therefore to be understood, that though it is the duty of the Court to grant the proper relief, the terms to be imposed between the parties, as to costs, are altogether in the sound discretion of the Court.

[369]

[*370]

ATT.-GEN.
 v.
 HARTLEY.

[375]

[After some further observations principally directed to points not retained in this report, his Lordship said :]

As to removing the master, I very early understood that it was not the habit of the Court to remove a schoolmaster thus appointed. He was appointed by persons who, whether they were, or were not, the committees or feoffees with the estates rightly vested in them, were the persons *de facto* acting as trustees. At the time of the appointment, there was no interposition against their conduct ; there was no interposition to lead him to suppose that he was to conduct the school upon principles different from those on which he accepted it ; and I do not think it unusual in this Court, to say, that where a person has acted as schoolmaster for a considerable period, though under an undue appointment, the Court will not permit him to be removed, unless it can be shewn that he ought to be removed for misconduct, which could have been justly made a ground for his discharge, if his appointment had been originally right ; and in the case of *Bosworth School, the Attorney-General v. Dixie*,† such were understood to be the principles on which the Court proceeded.‡

The first, and what appears to me to be the greatest difficulty, is that part of the information which relates to the vesting the estates in trustees duly appointed. It appears that there has been no conveyance of the estates comprised in the inquisition since 1650 : they have kept up in some way, perhaps not regularly, the trusts as to Sunderland's estates, but I do not see how it is possible to avoid some inquiry of the nature of that directed by the first part of this decree.

[*376]

The next question is, whether the offices of vicar and schoolmaster are incompatible or not, a question which, *I think, ought to be determined, and not made a subject of inquiry. A schoolmaster has his duties prescribed to him by the rules and regulations, and, if you please so to put it, by the practice of the school. If, being vicar of the parish, he cannot observe those rules and regulations, and act according to that practice, that would be a ground for his removal from the school. But looking at the duties of the offices, I have to ask, whether, as far as I know

† 13 Ves. 519.

‡ See *Foley v. Wontner*, ante, p. 110.

ATT.-GEN.
v.
HARTLEY.

them, they are incompatible? He happens to be vicar of Bingley, but if he were vicar of any other place, would that be incompatible? If he neglected his duty at his vicarage, provided he performed his duty as schoolmaster, I should have nothing to do with his neglect as vicar. But if you could shew that he had given so much personal attention to the vicarage as to neglect his school, the Court would dismiss him on the ground of his neglect of his duty as schoolmaster, but I cannot find any pretence for that in the evidence. If, on the other hand, it appeared that, according to the intention of the founders, the vicar of Bingley could not be the schoolmaster, then the Court would not have to consider whether the two offices are incompatible, but its dry, simple, naked duty would be, to remove him on the ground of that intention. But for that purpose the intention must be clearly manifested, and though I admit, upon reading the instruments, that I think the authors of these charities did not look forward to the event of the vicar being the schoolmaster, yet I cannot collect any thing which says that he shall not, and I think, therefore, that that part of the information must be dismissed.

With respect to the boarders, this case is of great importance, and I must take it to be a case in which boarders have, in a fair sense, been recently introduced into the school, boarders I mean in the master's house, for I do not find any witness who negatives, and there are *some who affirm, that the practice was to admit foreigners boarding with other persons in Bingley. Unless I am to say, that none are to be admitted to this school except inhabitants of Bingley, whether with or without relation to their settlements, or being the children of settled parents, I really do not know upon what the distinction is to turn, between boarders in Dr. Hartley's house, and boarders in other persons' houses, unless it be the circumstance, that his attention might be more exclusively called to the former than to the latter.

[*377]

Then, supposing this practice to have continued for thirty, or forty, or fifty years, or carry it as far back as any persons here speak of it, but, admitting that, previous to that period, there were no boarders, if I am to be called upon in this suit, not upon the ground of misconduct, or of too much attention being given

ATT.-GEN. to the boarders and too little to the scholars, to declare that
 v.
 HARTLEY. those boarders, of either species, shall not be taken, or to institute such an enquiry as is here directed, I must consider what sort of a precedent I am establishing with respect to almost all the grammar schools in the kingdom; for there are very few, I believe, in which boarders are not taken; and it is the principle of the universities, in a sense, with respect to commoners and fellow commoners. If I am to say, that Dr. Hartley shall have no boarders in this school, I do not know why an information should not be filed in every one of those cases of grammar schools in which boarders have been received, in many instances, to the infinite benefit of the free scholars. I feel, therefore, no inclination judicially to determine that Dr. Hartley shall take no boarders of either species, but I am ready to admit this, that if you can make out, that either in this school or in any other, the free scholars have not the attention paid to them that they ought to have, and that there are those distinctions
 [*378] *sedulously and anxiously, and which are still more improper, if corruptly kept up, between the free-scholars and boarders which are imputed here, that is misconduct that must be corrected; but upon the dry simple fact that boarders are taken, I do not feel inclined to direct an enquiry. On the other hand, when we know who are the proper trustees, I go the length of saying, that it will be their duty, as well as of the trustees of all schools that take boarders, to attend to whether the master does or does not go into excess upon the subject, and whether he is introducing boarders to an extent inconvenient and prejudicial to those who must be admitted to be the primary objects of attention, and, therefore, in the terms of the decree, I shall take care to point out the principles on which I act, in each view of the case, with respect to boarders.

[The minutes of the decree prepared by the LORD CHANCELLOR contained the following passage:]

[384] His Lordship doth declare, that the defendant, R. Hartley, having been nominated head master of the school at Bingley, as in the pleadings is mentioned, in the year 1791, and having continued to act as such schoolmaster for many years previous to the filing of the present information, the validity of his appointment

ought not to be brought into question, in case being so appointed, and having so long acted as schoolmaster, he has duly executed the duties of that office; and doth also declare, that the induction of the defendant, R. H., into the vicarage of Bingley, did not create any vacancy of the office of head master of the school, or require him to resign the same; that the duties of vicar, as they are by law permitted to be executed, are not incompatible with the office of head master of the school; and that there is no proof in this cause that they have been so executed in fact, as to have been incompatible therewith, nor any written evidence in this cause to establish, that the head master of the school could not hold that office if he became vicar of Bingley.

ATT.-GEN.
F.
HARTLEY.

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And doth also declare, that it appears, that for many years before the appointment of the said defendant to be head master of the said school, it had been usual for the said master to take boarders to be educated in the said school; and therefore, that he, and those who appointed the said defendant, must have understood that he was to be at liberty to take such boarders; that so taking boarders is not inconsistent with his duty as master of a free grammar school, unless it shall occasion a breach of duty in the neglect or improper treatment of such boys as are, of right, entitled to be free scholars in the said school, or a prejudice to them; and therefore, the defendant, R. H., is to be at liberty to take boarders, in such number, and to such extent, as shall be allowed by the persons acting as trustees *for the time being, and shall not occasion such neglect, improper treatment, or prejudice.

[335]

[*386]

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BRACKENBURY *v.* BRACKENBURY.†

(2 Jacob & Walker, 391—396.)

1820.

March 5.

Dec. 20.

Lord
ELDON, L.C.

[391]

A conveyance executed for the purpose of giving the grantee a colourable qualification to kill game remains, without being made use of, in the custody of the grantor, and after his death, of his son. The grantee afterwards obtaining the possession of it, by representing that he intended by means of it to impose upon a third person, claims the estate. A court of equity will not grant relief to either party.

In the year 1814, Charles Brackenbury devised an estate in the county of Lincoln to his eldest son, the plaintiff, for life, with remainders over. He afterwards executed certain indentures of lease and release, dated the 30th and 31st of August, 1815, by which, in consideration of natural love and affection for his second son, the defendant, and for his better maintenance and support, he conveyed the same estate to him in fee. This conveyance, it appeared, was made for the purpose of giving the defendant a qualification to kill game.

The testator died in 1816, when the plaintiff took possession of the estate. In October, 1817, the defendant called on the plaintiff, and, after stating that he had made a bet of ten guineas that he was qualified to sport, requested the plaintiff to lend him the above writings, in order to shew his qualification to the person with whom he had made the bet, promising to deliver them back immediately afterwards, and representing, that he should otherwise be obliged to pay the bet. The writings were delivered to the defendant, and, having thus obtained possession of them, he refused to return them, and was proceeding to recover possession of the estate by ejectment. The bill alleged, that the deeds had never been delivered, but remained in the possession of the testator as escrows, and prayed that they might be delivered up to the plaintiff, and for an injunction to restrain the action.

The defendant represented, that the deeds were regularly *executed by his father, and that the execution of them was attested in the usual manner; that living in his father's house, the latter retained possession of them as a trustee for him, and received the rents in order to reimburse himself considerable sums advanced on the defendant's account. He also stated, that the plaintiff

[*392]

† See *post*, p. 213.

having threatened to destroy the deeds, he had abstained from making any claim while they remained in his possession, but admitted that he had asked for them for the purpose mentioned in the bill, denying at the same time that he had promised to return them.

BRACKEN-
BURY
v.
BRACKEN-
BURY.

By the decree made by the VICE-CHANCELLOR on the 15th of June, 1819, the defendant was ordered to bring an ejectment, founded upon the indentures of August, 1815, for the recovery of the estate; the plaintiff undertaking to do everything to assist the defendant in trying it; and the defendant was to admit that the testator and the plaintiff continued in possession of the estate and the deeds, and that the defendant, except as to the promise to return the deeds, obtained possession of them as stated in the bill.†

On the trial, the plaintiff set up an outstanding legal estate, and the defendant (the plaintiff at law) was nonsuited. An order, on motion, was afterwards made by his Honour, on the 26th of November, 1819, directing a new trial, and that the plaintiff should admit that the father was seised in fee at the time of the execution of the indentures of August, 1815.

A motion was made on the part of the plaintiff to discharge this order.

Mr. Horne, for the plaintiff.

[393]

Mr. Hart, for the defendant.

* * * * *

THE LORD CHANCELLOR :

Dec. 20.

The bill, in this cause, was filed by an elder brother, a person of the name of Brackenbury, against his younger brother. The former, it appeared, had, in his possession, at the time of the death of their father, certain indentures of lease and release, conveying an estate to the latter, and the purpose for which they were executed was stated to be, that, in case any information should be exhibited against him for sporting without a qualification, he might go to the chest of his father, and, by producing them, defeat any such information: the policy of the

† Reg. Lib. A. 1818, fol. 1513.

BRACKEN-
BURY
v.
BRACKEN-
BURY.

law, *whether it is a wise one or not it is unnecessary to consider, requiring, that a man, in order to sport, should have a qualification in landed property.

[*394]

The father died with these deeds in his own possession. They had been delivered, in the technical sense of the word, but not to the younger son, and the younger son, in his answer, states that his father had been in the habit of making him certain allowances as one of his sons, and that he retained the rents of these lands by way of reimbursing himself the advances he so made. The bill alleged, that the father made his will, by which he left the estates to his eldest son, and that some time after the death of the father, the younger son came to his elder brother, and told him that he had made a bet with A. B. that he was a man qualified to sport, and he desired him, in order to win that wager, to put into his hands these indentures of lease and release, that he might shew them to the person with whom the wager was made. If the father executed these deeds for the purpose which the plaintiff alleges, viz. to make a fraudulent exhibition of them (as proving the qualification of his son) to defeat any prosecution that might have taken place against him by the law of the land, if he lent himself to a purpose which was contrary to the policy of that law, it might have become a considerable question, if the younger son had got possession of these deeds, whether a court of equity would have done any thing to relieve the father.

[*395]

The deeds were left in the possession of the father till his death, and the eldest son then obtains possession of them. He states in his bill that he thought it necessary to shew them to his brother, to enable him to win this bet, intimating that he was very wrong in so doing, and contending that he had no qualification ; but he lends himself to *the purpose of imposing upon the person with whom the wager was made. That having been done, and whether or not the younger son was looking to any purpose beyond that which the elder son says was his pretence, he turns round, as the plaintiff alleges, and says, Now I have got these deeds, I shall give notice to the tenants not to pay their rents to you any longer, but to pay them to me as owner of the estate ; and he brings an ejectment to get into possession. *Primâ facie*, with these deeds in his hands, being a conveyance from the father,

who was tenant in fee, there was nothing to impede that ejectment ; and the plaintiff accordingly files his bill for an injunction and the delivery of the deeds.

BRACKEN-
BURY
v.
BRACKEN-
BURY.

Recollecting the representation that was made on both sides, perhaps it might not have been very much out of the way if a court of equity had said, We will have nothing to do with it ; you may make what you can of it at law. The Court, however, directed the defendant to try an ejectment. The parties go to trial, and the defendant at law sets up an old outstanding estate, and defeats the ejectment ; an application is afterwards made to the Court which ordered the trial, and it directs that no outstanding estate should be set up. My opinion about that is, that, in a case such as this, that order ought not to have been made. I am of opinion, that if it was right to let the ejectment decide the matter under the circumstances in which these parties stood, it was right to let it decide the matter, as it would have been decided in the actual circumstances in which they stood before the order was made ; and it is a very different thing to say there may be an equity arising out of circumstances, to prevent an individual setting up a term to defeat an ejectment, and to say, merely because an ejectment is brought, it shall not be set up. I shall therefore discharge the order for not setting up the outstanding estate, but *without prejudice to the defendant's filing any bill for that purpose.

[*396]

* * * * *

1820.

Feb. 17, 18, 24.

Dec. 6, 23.

Rolls Court.

PLUMER,
M.R.

[413]

MARTIN v. MITCHELL.

MARTIN v. PEILE.

(2 Jacob & Walker, 413—429.)

Specific performance refused, of a contract improvidently entered into by ignorant persons.

Husband and wife having a joint power of appointment by deed, over the wife's estate, agree in writing to sell it. A specific performance cannot be compelled against them.

It seems that a contract signed by one party only may be enforced by the other, since where a contract is signed by one party only, the other by filing a bill for a specific performance, makes it binding on himself.†

ANN MITCHELL, the wife of James Mitchell, was entitled under the will of Peter Peile to the reversion in fee-simple, expectant on the deaths of Mary Martin (the plaintiff) and William Holmes and Betty his wife, of an estate, consisting of a house and about 33 acres of land. By indentures of bargain and sale dated 12th March, 1814, and by a fine, J. Mitchell and his wife mortgaged the reversionary interest of the latter to Daniel Waller for 150*l.* and interest; the reservation of the equity of redemption was to such person or persons, and for such intents and purposes, as James Mitchell and Ann his wife should, by any deed to be executed in the presence of and attested by two witnesses, appoint; and, in default of such appointment, as Ann Mitchell should by will appoint, with remainder to her in fee. By deed dated 19th August, 1814, the premises were charged with a further sum of 50*l.*, and interest, advanced by Waller.

The bill, after stating the interest of J. Mitchell and his wife in the estate as above, proceeded to allege that in December, 1814, they were desirous of disposing of it, and advertised it for sale by public auction on the 7th January, 1815, and that their solicitor Hodgson had written to the plaintiff, Mary Martin, to apprise her of their intention. A treaty then took place between the plaintiff and Hodgson, and several letters passed between them; in the course of which the latter proposed that the plaintiff should become the purchaser for an annuity of 50*l.* a year, payable to James Mitchell and his wife for their lives, and the life of the

† This is now settled law: *Smith* (1866) Ex. Ch. L. R. 1 Ex. 342, 35 v. *Neale* (1857) 2 C. B. N. S. 67, 26 L. J. Ex. 218.—F. P. L. J. C. P. 143; *Reuss* v. *Picksley*

survivor, and upon payment *of 250*l.* to satisfy the mortgage debt to Waller, and interest and expences ; it ended in an agreement for the purchase on those terms, which was concluded and put into writing on the 5th January, 1815. It appeared that this agreement was signed by J. Mitchell and his wife, but not by the plaintiff.

MARTIN
F.
MITCHELL.
[*414]

The bill then stated, that notwithstanding the agreement with the plaintiff, J. Mitchell and his wife had caused their reversionary interest in the premises in question to be put up to sale by auction on the 7th January, when the defendant, John Peile, was the highest bidder, and it was knocked down to him. After charging that Peile had notice of the prior agreement with the plaintiff, and that the price agreed to be given by the plaintiff was a full and adequate consideration, it prayed against Mitchell and his wife a specific performance, by a conveyance of their interest ; and against Peile, that the sale to him at the auction might be declared to be void, together with an injunction to restrain the other defendants from conveying their interest to him.

The bill was filed on the 8th of February, 1815. The defendants, Mitchell and his wife, by their answer, filed in the April following, denied having authorized Hodgson's treaty with the plaintiff respecting the sale, excepting that one letter expressing Mitchell's readiness to meet the plaintiff on the subject, had been written with his consent. They also set forth a letter from the plaintiff to Hodgson, dated the 15th of December, 1815, in which she said, that upon consideration she thought 50*l.* a year was too much, and she had, therefore, determined to wait the event of the sale, and take her chance there. They admitted, however, that afterwards, on the 30th of the same month, a meeting took place between *Hodgson and the plaintiff, who proposed to become the purchaser upon the terms of paying off the mortgage, and charges of granting an annuity of 50*l.* On the following day, Hodgson communicated the offer to Mitchell, who immediately rejected it, and declared that he would not treat with the plaintiff, being resolved upon a sale by auction, and they then went together to Foster, the solicitor of the plaintiff, and informed him that the plaintiff's offer was declined, and that the premises were to be sold by auction. The answer then stated, that on the 5th of January, the plaintiff, with a Mr. Walker, being at Harrington, (the place

[*415]

MARTIN
v.
MITCHELL.

where the defendants, the Mitchells, resided) sent for them, and told them that they were come to treat for the purchase of the estate at Prospect, upon which Mitchell said, that he had left the business of the sale of the estate to Hodgson; they said that Walker then cautioned them against the law charges that would be made by Hodgson, and by various menaces, persuasions, and promises of friendship on the part of the plaintiff, used his utmost endeavours to persuade them to sell the premises to her by private contract; that he represented their interest as not worth more than 500*l.* or 600*l.* and persuaded them that he and the plaintiff possessed the power of preventing the public sale, and refused to give them leave to depart; by these means they were, they said, prevailed upon to sign the agreement, which was drawn up by Walker, without communication with any person on their behalf. They said, that under those circumstances they did not conceive themselves bound by this agreement, and in the evening of the same day, the defendant Peile having made them an offer of 1,200*l.* for their reversionary interest, they entered into and signed a contract to sell it to him at that price; but it was agreed that the sale by auction advertised for the 7th January following should still take place, and if more than *1,200*l.* should be bid, the contract was to be void; if not, Peile was to be the purchaser at that price. At the sale, Walker attended on the part of the plaintiff, and informed the persons present of the agreement with her. The estate was knocked down to Peile at 1,200*l.*, no one having bid more: by the conditions of sale the purchase money was to be paid in three months. The answer of the defendant Peile was to the same effect as that of the Mitchells; they all insisted, that under the circumstances the contract with the plaintiff was void.

[*416]

In November, 1815, a supplemental bill was filed against Peile, stating, that since putting in their answer the other defendants, Mitchell and his wife, had offered to complete their contract with the plaintiff, and had, in consequence of the offer being accepted, by a deed of appointment, executed on the 29th of May, but bearing date the 5th of January, and by fine, conveyed to her their interest in the premises; she gave her bond, with a surety for the payment of the annuity of 50*l.* a year. The bill then suggesting that the mortgage made to Waller had been assigned

to Peile, prayed that the plaintiff might be let in to redeem it and a conveyance.

MARTIN
v.
MITCHELL.

By the answer to this bill, it appeared that on the 19th of January, 1815, an indenture of bargain and sale was executed, by which Waller, the mortgagee, and J. Mitchell and his wife conveyed and appointed the premises in question to the defendant Peile; he discharged the mortgage debt, amounting, with interest, to 203*l.* 18*s.*, and paid 46*l.* 2*s.* to Mitchell; the rest of the 1,200*l.* was to be paid at the time stipulated in the conditions of sale. This conveyance had not been mentioned in the answers to the original bill.

Witnesses were examined on both sides, to prove the documents referred to, and the value of the premises; *there was no evidence relative to the circumstances under which the agreement with the plaintiff was signed.

[*417]

Mr. Horne and Mr. Phillimore, for the plaintiff.

Mr. Heald and Mr. Bickersteth, for the defendant Peile, besides contending, that under the circumstances accompanying the agreement with the plaintiff, the Court could not consider it to have been fairly made, insisted that it was void from the coverture of Ann Mitchell. It was the contract of a married woman, who was necessarily incapable of parting with her property, or doing any act to bind it, except by a fine or an execution of her power; and it was not an execution, being made without the proper formalities. She could not be compelled to execute her power. Even if the Court could consider this as a defective execution, it would not lend its assistance unless there was a consideration; and here there was none, for the plaintiff did not sign the contract, and therefore was not bound to pay the annuity agreed for. It may be argued, that the difficulty is got rid of by the subsequent conveyance to Peile, and that having taken with notice of the plaintiff's contract, he may be declared a trustee for her; but the contract of a *feme covert* is void for every purpose. She and those who claim under her are not even morally bound by it; and therefore notice cannot affect the defendant. Besides the effect of that argument would be, that

MARTIN
v.
MITCHELL.

the contract, though void at first, would be rendered available by an appointment being executed to other uses.

Mr. Horne in reply:

[*418]

The contract with the plaintiff is a defective execution of the power reserved to Mitchell and his wife by the *mortgage deed, and the Court will supply the formal defects in the same way as it is in the habit of doing with other instruments executed for valuable consideration, when any of the requisite formalities have been neglected. There is as much reason for applying that doctrine to the case of a married woman as to any other case; for the only question is, whether she is able to execute it. If the property be settled to her separate use, it will be bound by her giving a bond or a promissory note, though not executed *modo et formâ* as required by the power. The power here gives her a species of ownership as to which she is a *feme sole*. It is said that the agreement is void; but when a power such as this is given, it must be considered that it includes in it a capacity to contract in respect of the power. The object is that she may be able to sell and convey; but if she cannot contract, if nothing but an actual conveyance is effectual, no one could deal with her, and the object of the power would be defeated.

With respect to the other point, the want of signature by the plaintiff, it was never doubted till the dictum of Lord REDESDALE, in *Lawrenceson v. Butler*, 1 Sch. & Lef. 20,† that the signature of the agreement by the defendant was sufficient to enable the Court to execute it. The point has been several times expressly decided. *Hatton v. Gray*,‡ *Coleman v. Upcot*,§ *Buckhouse v. Crosby*,|| *Owen v. Davies*,¶ *Seton v. Slade*.†† Unless there is mutuality in the substance of the contract, the Court will not enforce it; but it does not follow that there must be mutuality in the signature. What was said by Lord REDESDALE was only thrown out extra-judicially; and it has not since been acted on.

[419]

The MASTER OF THE ROLLS made some remarks upon the case, which are not inserted here, as the substance of them was incor-

† Dictum not followed, see *Western v. Russell*, 13 R. R. 178, 180 (3 V. & B. 187, 192).

‡ 2 Ch. Ca. 164.

§ 5 Vin. Ab. 527, pl. 17.

|| 2 Eq. Ca. Ab. 32, pl. 44.

¶ 1 Ves. sen. 82.

†† 6 R. R. 124 (7 Ves. 265).

porated in his judgment afterwards delivered: he expressed a desire that some of the points should be re-argued.

MARTIN
C.
MITCHELL.

The case was mentioned again, when, in addition to the former arguments, *Daniel v. Adams* † was referred to on the part of the plaintiffs.

Dec. 6.
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THE MASTER OF THE ROLLS:

Dec. 23.
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These causes, after having been a long time depending, now come on for decision; and I am rather concerned that it is necessary to decide them; as I on a former occasion threw out for the consideration of the parties, whether they would not agree upon a different course; thinking that it would be for the benefit of these poor persons, that the sale by auction of their property should not have been interrupted, and that it might even now take place. That was for the parties to consider, but as it has not been done, they are entitled to the judgment of the Court. I also stated my impression of some of the difficulties in the way of the plaintiff's case, that seemed to have been imperfectly considered, in order to give an opportunity for further argument. Still I have heard nothing satisfactory; no new arguments have been adduced, and all the difficulties of the case remain untouched.

The original bill, which was filed in February, 1815, was for a specific performance, by J. Mitchell and his wife, of their agreement to sell to the plaintiff their reversionary *interest in this property. It, therefore, calls on the Court to exercise the discretionary power which it possesses, of lending its extraordinary aid in the enforcement of a contract; and it depends upon whether the plaintiff has made out such a clear and plain case that the Court is bound to exercise that power on her behalf. I have lately had an opportunity of explaining the principles which govern the Court in cases of specific performance; it is not, therefore, necessary to enter into them now, further than to observe that the agreement must be, as Lord HARDWICKE says, "certain, fair and just in all its parts;"† it does not follow, if it be good in point of law, that it must be carried into

[*420]

† Amb. 495.

† *Buxton v. Lister*, 3 Atk. 386.

MARTIN
v.
MITCHELL.

execution ; many circumstances may operate to induce a court of equity to refuse its assistance, though the agreement may stand the test of a court of law.

The supplemental bill is filed by the same plaintiff, after having obtained from Mitchell and his wife a conveyance conformable to the agreement. But in the interim, Mitchell and his wife had parted with all their interest ; they had conveyed to Peile by instruments that certainly were valid to pass the legal estate. The conveyance to the plaintiff could pass nothing, and the supplemental suit is of no use. The question comes back to this, whether the first agreement is such as the Court ought to perform ? To determine this, it is necessary to examine fully all the circumstances of the case.

His Honour, after stating and commenting on the pleadings, proceeded as follows :

[*421] The first witness is the person who attested the signature of Mitchell and his wife to the agreement ; he proves their signature, but he is not examined as to *any circumstances attending it ; nor does the defendant cross-examine him on the subject. The answer puts in issue, that they were induced to sign by menace and imposition ; but there is an absence of proof on both sides. The conveyance to the plaintiff is then proved : and it appears, that these people levied a fine also ; though having at the time no interest. It only shews they were made instruments, one day to execute one thing, and another day another. Two land-surveyors and Mr. Morgan the actuary, prove the actual net value of the reversion to have been 1,016*l.*, and that the annuity which the plaintiff was to give, was worth 881*l.*, which, with the 250*l.* due on the mortgage, would have amounted to more than an equivalent. This might, under some circumstances, be a fair mode of treating it : but it is not the way in which the Court can deal with it ; when it sees that a more advantageous mode of sale was about to take place, at which there were likely to be competitors. Was it advisable for these illiterate persons to sell in this manner, behind the back of their solicitor, who had advised them against a private sale ? The plaintiff knew Hodgson was their solicitor in this business ; then, was it not reasonable and fair to give him notice that he might be present ?

He would then have seen whether they had before them all the information that was necessary: he would not have advised them to sign a paper not binding upon the other party. It is evident that nothing was done but to consult the interest of one side: the plaintiff had her attorney with her to draw up this agreement. Then, can it be said that this was a proper mode of proceeding? Hodgson might by the 5th of January have found a prospect of selling it more advantageously. It was within ten days of the sale, and any one properly advising them, would have recommended them to wait. A small advantage, if they could have gained any, would have been of great importance to them. It was clear, that if there had been a competition, Peile *would have been willing to give 1,200*l.*; about 200*l.* more than the price that the plaintiff was to give; and Hodgson says, in his evidence, that if the property had been exposed to public sale, unincumbered by any previous contract, he believes the price would have reached 1,600*l.* Then, can it be said that they were fairly dealt with, when, ignorant as they were, they were made to sign this paper, without any counterpart, and by which, if the Court were to compel them to execute it, they would lose at least 200*l.*, and perhaps 600*l.*? Was it proper for an aunt thus to use the influence that she might naturally have over her niece?

MARTIN
v.
MITCHELL

[*422]

The evidence on the part of the plaintiff goes only to the signature of the agreement and the value of the property; nothing is proved as to the concomitant circumstances. One of the witnesses for the defendant, Hodgson, says that it was worth 1,200*l.* and upwards, and would probably have sold for 1,600*l.*; thus there is a contradiction as to the value. Another witness, Bell, says that it was worth 1,200*l.*, and that he would have given that sum for it; and we find that Peile actually contracted for it at that price; then, can the Court say that it was not sold for an inadequate price? Hodgson says, that Mitchell and his wife were ignorant and illiterate persons, wholly inexperienced in matters of business; he adds, that previous to the 5th of January, the plaintiff had told him that she was determined to wait the event of the sale, and he had informed her that Mitchell and his wife had made up their minds not to sell in private: he afterwards witnessed the contract made with Peile on the same day.

MARTIN
v.
MITCHELL.
[*423]

These are the facts in proof, under which the case is presented to the Court, and we must consider only how it stood on the 5th of January, for the subsequent transactions *are of no importance. Was the agreement with the plaintiff so perfectly fair and certain, and with reference to all the circumstances, so just, that the Court can be satisfied that it ought to perform it? It seems to me, that the Court cannot decree the execution of it, attending to all the circumstances accompanying it, considering the age of these persons, their poverty, that they were acting without their attorney, that the property was reversionary, and that the price was not the full value. They were induced, by a person who got hold of them in the absence of their legal adviser, to make an improvident bargain, by which they would have been deprived of at least 200*l*.

Independently of these circumstances, I stated several difficult questions attending the case, to which I have received no satisfactory answer. Consider first, the nature of the interest: the estate, belonging to the wife, was mortgaged by the husband and wife to Waller, by two mortgages; and the equity of redemption was reserved to such uses as the husband and wife should, by deed executed in the presence of two witnesses, jointly appoint, and in default of a joint appointment to such uses as the wife should by will appoint, and in default of such appointment to the wife in fee. This raises a question that introduces the consideration of the class of cases relating to the effect of a reservation of an interest in the equity of redemption to the husband, in a mortgage made by the husband and wife, of the estate of the latter. In *Innes v. Jackson*,† where the equity of redemption was reserved to the husband alone, the LORD CHANCELLOR was of opinion that it continued to be the wife's estate. That decision was reversed in the House of Lords; but on the ground of *a distinction taken by Lord REDESDALE, who, after a review of all the authorities, came to the conclusion that there were two classes of cases,—first, where the equity of redemption is reserved to the husband and his heirs, without any appearance of an intention to resettle the estate, or alter the previous rights; secondly, where, from other circumstances independent of the

[*424]

† 10 R. R. 190, 20 R. R. 45 (16 Ves. 356; 1 Bligh, 104).

MARTIN
v.
MITCHELL.

reservation itself, any intention to make a new settlement appears. And that case clearly fell within the second class, for the mortgage was only for a term of years, while the conveyance extended to a limitation of new uses of the fee, shewing that it was executed for a double purpose. But it is open to consideration in this case, where the mortgage was in fee, whether there was any intention to alter the nature of the wife's estate. The reservation does not give the husband any interest; he was only to have a naked power. It might, therefore, be important to consider how far the property continued to be hers; and if it was still hers, then what was the effect of this contract under the power reserved?

The acts of a married woman, with respect to her estate, are perfectly void; she has, as is said by the MASTER OF THE ROLLS, in *Wright v. Rutter*,† no disposing power, though she may have a disposing mind. This agreement signed by her with her husband cannot affect her estate, and cannot give the party a right to call upon her in a court of equity to execute a conveyance to bar her if she survives, and to bind her inheritance. It was only under the power reserved by the settlement, that its validity could be contended for, and on that point I wished to be satisfied, whether being void on general principles, it was made good by the reservation of the power. I wished to know if there was *any case in which a husband and wife having a power of ap-
[*425]
pointment by deed over the wife's estate, a paper, not executed *modo et formâ* pursuant to the power, was held to take effect as an appointment. If it is signed by a person competent to contract, and is for a valuable consideration, but defective in form, there is a remedy in equity, for you have a valid contract to stand upon. But with a married woman there can be no binding contract; the instrument is not good as an agreement, then how can it be said to bind her? She had a power to convey by deed, attested by two witnesses; her disability as a married woman was taken away as to that mode of proceeding; and she might, by an instrument executed with the required formalities, point out the uses to which the estate was to be conveyed, and the fine would then enure to those uses. But where the instru-

† 3 R. R. 24, 27 (2 Ves. jr. 673, 676).

MARTIN
v.
MITCHELL.

ment is not executed according to the power, it is nothing but an agreement signed by a married woman, and as an agreement it is invalid. This is a point on which I do not mean to give a definitive opinion, because it is not necessary for the decision of this cause; but I feel that there would be very great difficulty in extending the doctrine of the Court as to defective executions to instruments signed by married women; it would be introducing quite a new line of cases. The power gives a competency to act, with certain protections, but it is a very weighty question whether it can be held that that gives a general competency.

[*426]

Then, if it was only the agreement of the husband, what becomes of the plaintiff's case? The point, that the Court should compel the husband to coerce the wife to join with him in the conveyance, was abandoned. The counsel did not urge that that is the law now, and that the husband was to go to prison, if she refuses to *concur. It is not necessary, therefore, to go into the class of cases upon that subject, the authority of which has been very much weakened.† They were much shaken by the remark of the LORD CHANCELLOR, upon the difficulty of a court of equity compelling her to consent to a fine, while the Court of Common Pleas always examines her to ascertain whether she acts freely, and if they find her to be under constraint, still her consent must be taken, or the husband will be punished. That point, however, is not pressed here.

Another difficulty arises from the circumstance that the agreement was not signed by the plaintiff, but only by Mitchell and his wife. I do not intend to enter upon the numerous cases on the question, how far a contract signed by one party only is binding on that party. A doubt has arisen on the subject in consequence of what was said by Lord REDESDALE in *Lawrence-son v. Butler*; † he considered, that, unless the agreement was signed by both parties, there was a want of mutuality, which upon established principles is an objection to specific performance. The doubt I have on that is, whether there is not mutuality; the one party is to buy, and the other to sell; and

† *Emery v. Wase*, 7 R. R. 109, see (1 Madd. 1, 7).
note, p. 116 (8 Ves. 505, 515); ‡ See *ante*, p. 188.
Howell v. George, 15 R. R. 203, 205

the contract is therefore in its nature mutual, though not evidenced by a writing binding on both. I am aware that the subject has been re-considered, first by the LORD CHANCELLOR, who, however, only mentioned it, without giving his own opinion, and by the late MASTER OF THE ROLLS, who thought he should hardly be at liberty to refuse relief on that ground; † and I do not mean to disturb the prevailing opinion that the party who has not signed may, nevertheless, file a *bill, and compel an execution of the contract. It is considered that when the party files the bill he does an act that will bind him, and that from that time there is mutuality; ‡ and that the other party cannot plead the statute, because the words only prevent an action from being brought where the agreement is not signed by the party to be charged or his agent. As I observed before, the statute is in terms confined to actions at law, not extending to suits in equity; and the word “charge” evidently means, charged in the action. When you file a bill you attempt to charge the defendant; and if he has signed the agreement, it is signed by the party to be charged, and it seems to follow that he cannot take advantage of the statute.

MARTIN
v.
MITCHELL.

[*427]

If this agreement had been attempted to be enforced against the plaintiff, as she had not signed, and as there had been no acts of part performance, the statute would have operated directly to relieve her. Then, how did the matter stand on the 5th January, at the time Mitchell and his wife made the second contract? The plaintiff was not bound by the first contract, and there was, therefore, then no consideration moving towards them; nothing was given for their signature, there being no signature *e contra*. Then, what was there on that day, and at that hour, to make it binding on them? If under other circumstances Ann Mitchell would have been bound to execute their power in proper form, she was not on that 5th of January in a situation to be compelled so to do; for it is only when there is a valuable consideration that defects in the execution can be supplied: here there was a want of consideration to induce the Court to lend its assistance.

+ *Western v. Russell*, 13 R. R. 180. 8 R. R. 310 (12 Ves. 107). [And see

‡ See *Coleman v. Upcott*, 5 Vin. note at p. 184 above.]
Ab. 527; *Gaskarth v. Lord Louthier*,

MARTIN
v.
MITCHELL.

[428]

I wished it to be considered whether, the one party not having on her part done any thing to bind herself, the other is in the mean time precluded from entering into a new agreement. What mutuality is there if the one is at liberty to renounce the contract, and the other not? If she intended to bind them, she should have bound herself; but if she will reserve to herself a power to act or not to act, must they not have the same power? And then, were not they on that day in a situation in which they might repent and retract?

In looking over the cases the strongest I have found is *Buckhouse v. Crosby*,† reported in a book of no great authority. I took some pains in searching for it in the Registrar's book, but though there were some traces of it there, and in the minute book, there is not any sufficient account of it to be found. To a certain degree it answers some of the objections that arise here. One party not having signed the agreement, and the other making a new agreement, the Court relieved against it; but it is observable that it does not appear that any objection was taken from considering what was the state of things at the time when the second contract was made. But when one party, having entered into a contract that has not been signed by the other, afterwards repents and refuses to proceed in it, I should have felt great difficulty in saying that he had not a *locus pœnitentiæ*, and was not at liberty to recede until the other had signed, or in some manner made it binding upon himself. How can the contract be complete before it is mutual? and can it be complete as to the one and not to the other?

[*429]

With all these difficulties hanging over it, it is not a case for a specific performance; the parties must be left *to their legal remedies. On the original bill I think the plaintiff is not entitled to a decree, and there is still less to sustain the supplemental bill. I have only to notice, that I think the plaintiff ought to have been informed of the conveyance of the 19th January, which was not mentioned in the answers, and the plaintiff may therefore have innocently filed the second bill in ignorance of it. The bills must be dismissed; but it does not appear to me to be a case for costs.

† 2 Eq. Ca. Ab. 32.

KENNEDY *v.* KINGSTON.†

(2 Jacob & Walker, 431—435.)

Bequest of 500*l.* to A. for her life, and at her decease to divide it in portions as she shall choose to her children; and if A. died before testatrix, to be equally divided amongst her children: Held, that the children of A. living at her death were the only objects of the power, and as such entitled to a share lapsed by the death of a child to whom it had been appointed.

A power to appoint the proportions in which definite objects are to take, tacitly includes a gift to them in default of appointment.

ANN ASHBY, by her will, dated the 3rd of August, 1785, bequeathed as follows: "After the decease of my sister Charlotte Williams, I give 500*l.* to my cousin Ann Rawlins for her life, and at her decease to divide it in portions as she shall chuse to her children; and in case she dies before me, I leave the sum to be equally divided amongst her children, after the decease of my sister Charlotte Williams." She appointed her sister sole executrix; who survived her, and died in the year 1795.

Ann Rawlins had four children, William Rawlins, Charlotte Hawkesworth, Jane Walsh, and Elizabeth Ann *Rainsford. W. Rawlins died in the year 1807; and after his death, Ann Rawlins made a will, by which she appointed 250*l.*, part of the sum of 500*l.*, to her daughter, E. A. Rainsford: 100*l.* to C. Hawkesworth, and the remaining 150*l.* to Jane Walsh. She survived her daughter E. A. Rainsford, and made a codicil to her will, which however did not affect the sum of 250*l.* appointed to her. She died in November, 1812, leaving her two daughters C. Hawkesworth and Jane Walsh surviving her. C. Hawkesworth died in the year 1809.‡ A suit had been instituted, having for one of its objects to secure the legacy of 500*l.*; and a petition was now presented, praying that the rights of the parties to it might be declared.

Mr. Roupell, for Jane Walsh and the representative of C. Hawkesworth:

The share appointed to E. A. Rainsford has lapsed by her death, and must be divided in the same way as if it had been

† *Freeland v. Pearson* (1867) L. R. 3 Eq. 658.

‡ *Sic* in the report: it should apparently be 1819.—F. P.

1821.
Jan. 22.

Rolls Court.
PLUMER,
M.R.
[431]

[*432]

KENNEDY unappointed. The fund is given to the children, and the power
v. is only to vary the proportions; in default of appointment, there-
KINGSTON. fore, there was to be an equal division; and as it was to take
 effect at the mother's decease, those only who survived her could
 be objects of the power; the unappointed part is therefore divisible
 between them. If it vested, subject to the power, in all the
 children, it must have vested in them in joint-tenancy, and the
 two who were living at the mother's death would be entitled by
 survivorship.

Mr. Fonblanque for the representative of E. A. Rainsford,
 contended that there was an intention of bounty towards all the
 children, and that they were all entitled to participate in the
 lapsed share.

[433]

Mr. Horne for the representative of Charlotte Williams :

The testatrix has given a mere power of appointment amongst
 the children, without any gift to them in default of its execution.
 A gift to the objects of the power in default of appointment is
 sometimes supplied by implication, but that is excluded here by
 the express gift to them in one event, namely, that of A. Rawlins
 dying before the testatrix. The 250*l.* therefore falls into the
 residue of the testatrix's estate.

THE MASTER OF THE ROLLS :

This question arises on a very short clause in a will ; the sum
 is given to Ann Rawlins for her life, "and at her decease to
 divide it in portions as she shall choose to her children." It is
 first to be considered what is the import of these words, taken
 alone, without reference to those which follow. Two out of the
 four children died in the lifetime of the donee of the power, one
 before and the other after the execution of the appointment. The
 question will be, whether it is not to be construed as pointing out
 as the objects of bounty those only who should survive the
 mother ; for the power given is, to divide at her decease. Then,
 could it be executed in favour of one who died in her lifetime ?
 The term children is general, but as the power is to be executed
 at her decease, it must be for the benefit of those then capable

of taking. It is, therefore, necessarily confined to children in existence at the time of her death. Therefore none but the two who have survived can take under the power; they are clearly entitled to the sums appointed to them.

KENNEDY
v.
KINGSTON.

The difficulty is with respect to the part as to which there is, in the events that have happened, a non-execution. There is no gift over in default of appointment, in express terms; but if the mother had died without *making any appointment, would not the children surviving her have been entitled? would they, though certainly objects of the testatrix's bounty, have taken nothing? Upon that question, the case becomes one of that class where the objects of the power are definite, and the power is only to appoint the proportions in which they are to take, without excluding any; for here the mother must have given a share to each; she could not have made an exclusive or an illusory appointment. The power, therefore, must be understood as tacitly including a provision for an equal division of the fund amongst the objects, in the event of no appointment being made. The two who survived would, therefore, be the only persons to take; they only could take under an appointment, and if no appointment were made, they would take by necessary implication.

[*434]

Supposing that to be the construction, if the bequest were confined to the first clause, the next question is whether the other part makes any difference? In case of Ann Rawlins dying before the testatrix, the sum is to be equally divided amongst the children; and it is said that the mention of one event upon which they were to take in default of appointment, is an exclusion of any other; and that it was, therefore, not meant to go to them except upon an event that has not happened. But this does not appear to me to be a necessary consequence. She might die in the lifetime of the testatrix; she might survive and make a complete appointment; or she might survive and make an incomplete appointment. There is no provision in express terms for the event which has actually happened, of her surviving and making an incomplete appointment, or for her making no appointment at all; but that is quite consistent with the express provision for her dying before the testatrix, as in that event the fund was not disposed of by the previous part of the will.

KENNEDY
 v.
 KINGSTON,
 [435]

It does not, therefore, seem to me that this provision annihilates the implication arising from the previous part of the sentence, which I consider as embracing a power to appoint to the children who should survive, with a gift to them in default of appointment. The two survivors, therefore, are entitled alone to the whole sum.

1821.
 Feb. 13, 19.

Rolls Court.
 LORD CHIEF
 BARON
 and
 Masters
 ALEXANDER
 and
 DOWDES-
 WELL
 for
 PLUMER,
 M.R.

[459]

BROMHEAD v. HUNT.

(2 Jacob & Walker, 459—464.)

Gift of personal property to trustees, to be settled on the marriages of the testator's daughters for their separate use, and on their deaths upon trust for their children, with a limitation over in the event of either of the daughters dying without having been married, or without leaving any children her surviving.

The shares of the children of each daughter are vested, subject to be divested by all dying before their mother; and there being one alive at her death, the representative of two who died before her, held entitled to their shares.

JAMES HUNT, by his will, gave the residue of his estate and effects to his executors upon trust, to convert it into money, and invest the produce in the funds, and to stand possessed of it, in trust for all his children living at his decease, or born in due time afterwards, equally to be divided amongst them; the shares of sons to be transferred and paid at 21, and the shares of the daughters to continue vested in the names of his executors, for their benefit, upon the trusts therein declared. The will then contained directions as to the maintenance of the children during their minorities, and a clause of survivorship in the event of any of the sons dying under 21, or the daughters before marriage. It was then provided that the shares of the daughters were to continue in the names of the executors, upon trust, to permit *them, on attaining 21, to receive the interest, during their lives, or till they should marry, and to transfer and pay to them one third of the principal of their respective shares, on the day of their respective marriages; and to assign, settle, and assure the remaining two third parts, in the names of themselves, or other trustees, upon trust to pay and apply the interest and dividends, for the separate use of his daughters for their lives; and after the

[*460]

BROMHEAD
v.
HUNT.

decease of his daughters, “upon trust, as to the principal and the stocks, funds, and securities, in which the same shall be then invested, in trust for, and for the benefit of all and every the children of my said daughters, in equal parts, shares, and proportions; and in case either of my said daughters shall happen to die without having been married, or if married, shall not happen to leave any children her surviving, then upon trust, to assign, transfer, and pay the said trust funds, and securities, unto her surviving brothers and sisters, and the children of any deceased brother or sister, in equal shares and proportions, such children taking only such share as their parent would have been entitled to if living.”

The testator died in 1799, leaving a widow and five children surviving him. One of his daughters, Margaret, having attained 21, married J. Empson, and died, leaving one infant son, W. J. Empson; she had issue two other children, who died in her lifetime, and to whom their father took out administration. Two-thirds of her share of the testator's estate had been transferred into the name of the Accountant-General; and a petition was now presented in the name of the infant, W. J. Empson, claiming the whole of this fund as the only surviving child at his mother's death. The father, J. Empson, also petitioned, claiming to be entitled to two-thirds of it, as representative of his deceased children.

Mr. Horne, Mr. Rolfe, and Mr. Tinney, in support of the petition of the infant. * * * [461]

Mr. Agar and Mr. Empson, on the other side. * * *

[The principal cases cited by counsel are referred to in the judgment.]

THE LORD CHIEF BARON :

[462]

In this case there are two petitions; one by the surviving child of Mrs. Empson, claiming to be entitled to the whole of a fund that was settled on his mother for her life; the other by the father as administrator of two children who died before the

BROMHEAD
v.
HUNT.

mother, insisting that they took vested interests. The question arises on the will of J. Hunt, by which he gives all the residue of his property to trustees; there is no division in the bequest of interest from capital; the whole is given to the trustees out and out; they are to apply the interest in the manner directed, and, in certain events, to transfer the capital. The object of the first direction given is, that it may be so settled as to secure the receipt of the interest for the daughters during their lives; and after the decease of the daughters it is given in trust for all and every their child and children. If it rested here, there could be no doubt that each of the children took absolute vested interests.

There is then a gift over in case either of the daughters should happen to die without having been married, or without children surviving her; and upon this part of the will the question arises whether the effect of the former words, which seem quite clear as to vesting, is destroyed by it. There is no limitation over in the event of some of the children dying in the lifetime of their mother; and if it is to be supplied, it can only be by some inference. The daughter having left a child, that is sufficient to satisfy the words; the gift over therefore does not take effect; then is there anything to give it to those only who survive? Such a construction would, no doubt, be very inconvenient; for if the children of the daughters married, and had issue, and then died in the lifetime of their mother, could we take away all benefit from the issue, by an inference drawn from words that do not look towards survivorship. The daughter has married and has left a child; in that event there is no limitation over expressed; but there is an express gift to the children absolutely; how then can that be divested?

If there had been no authority, I should have thought, and my learned friends agree in opinion with me, that this must clearly be the construction; but there are authorities in point. In *Skey v. Barnes*† the testator gave personal property after the death of his daughter to be divided amongst her children, and the issue of a deceased child: the portions of the sons to be paid at 21, and those of the daughters at 21, or marriage, with a gift over in the event of there being no issue, or

† 17 R. R. 91 (3 Mer. 335).

[*463]

of their all dying before their portions became payable. Sir W. GRANT considered it, as he did every case, in a most clear and satisfactory mode, and held the shares to be vested in the children, and transmissible to their representatives. That is certainly a stronger case than this. There is another case, *Sturges v. Pearson*,† where there was a gift of personal property to be divided amongst three children, or such of them as should be living at the death of their mother. They all died before her, and the VICE-CHANCELLOR was of opinion that the *will gave them vested interests, to be divested only in the event of there being some or one of them living at the mother's death, and that not having happened, their shares passed to their representatives. These two cases are direct authorities for the principle on which we proceed. We are of opinion that the shares of the children who have died were vested, and that their father is entitled to them.

BROMHEAD
HUNT.

[*464]

* * * * *

ELLISON v. BIGNOLD.

(2 Jacob & Walker, 503—512.)

On a bill by some directors of an insurance company, constituted by deed, against another director, alleging misconduct, the Court refused to interfere by continuing an injunction, the plaintiffs not having made use of the powers of regulation given them by the deed.

1821.
March 7, 9.
—
Lord
ELDON, L.C.
[503]

THE bill in this cause was filed by ten of the directors of a society called the National Union Fire Association, on behalf of themselves and the other members, against Thomas Bignold, and another person, also directors of the same society. The association was formed by a deed, dated in March, 1819, and expressed to be made between the persons, whose names were or should be subscribed in the schedule thereto, of the one *part, and certain trustees of the other part, by which it was witnessed, that the persons, parties of the first part, had resolved and agreed, and did by way of declaration and not of covenant, spontaneously and fully consent and agree to establish a volun-

[*504]

† 20 R. R. 316 (4 Madd. 411).

ELLISON
v.
BIGNOLD.

tary fire society, for the purpose of securing to the members pecuniary remuneration for losses by fire. The parties of the first part then covenanted with the trustees, to observe and perform the articles and provisoes of the deed.

The deed contained various articles, the principal of which were to the following effect. Every person executing the deed or any other instrument obliging him to its stipulations, became a member of the society, and was to receive a part of the annual premiums, and to bear a part of the losses, in proportion to the sum in which he was insured. The management was to be committed to twelve directors, who were to hold their offices for life, with salaries and an allowance for attendance on the business of the society. The directors were to fix upon a seal for the society, and to select one of their number to be president, and they were to appoint the trustees, auditors, secretaries, treasurers, surgeons, solicitors, surveyors, agents, clerks, and other servants, with some exceptions. The directors were to choose from two to five members to be auditors, who were to examine and audit the accounts of the society relating to the policies, cash, and other effects, quarterly at least; the auditors were, from time to time, to make a report of their proceedings to the directors; and the directors were, as they should think fit, to order money balances of all such accounts, or any other accounts, whether audited or not, to be paid into the hands of the treasurer or treasurers, and securities to be deposited with the trustees. The funds of the society were to be applied to answering the policies and indemnifying the directors and trustees, and *any deficiency was to be supplied by the members at large proportionally. There was a proviso for filling up the places of directors who should die, desire to be discharged, or for six months neglect to act; and if any director should refuse to act in the department assigned to him by the majority, or should be guilty of a breach of trust concerning the society, or become bankrupt, take the benefit of any act for the relief of insolvent debtors, or execute a composition deed, he was to be discharged from his offices. The directors were empowered to make other orders and by-laws, so that none of them should be repugnant to the general principles of the deed.

[*505]

By the 24th article it was recited that the defendant, T. Bignold, was the projector and founder of the society, that he had been at great expence in bringing it to maturity, and that it was likely to derive great advantage from his knowledge and experience, and that he had agreed and did thereby agree for the space of three years to advance 10,000*l.*, to answer any immediate calls, and also, while entitled to the allowance thereafter mentioned, to pay the rent and taxes and other contingent expences of the houses and offices used for conducting the business, and to provide a secretary, clerks, and servants, who were to be approved of by the directors, and to be subject to be dismissed by them. In consideration of which it was agreed that Bignold should be entitled for his life to receive and take 10*l.* per cent. upon the premiums, when they should amount to 30,000*l.* per annum, 5*l.* per cent. upon the next 20,000*l.*, and 2*l.* 10*s.* per cent. upon all further premiums, over and above the expences of conducting the office, to be paid by him as aforesaid: he was also to have a power of appointing, by deed or will, an allowance of 7*l.* 10*s.* per cent. upon the premiums for a term *of 14 years from his death: if he made no appointment that allowance was to be paid to his next of kin.

ELLISON
v.
BIGNOLD.

[*506]

This deed was only executed by five or six persons, but it appeared that the policies contained a clause, by which the persons accepting them bound themselves to the performance of the covenants and articles in the deed; about 2,000 insurances had been effected in this manner, making the parties insured members of the society.

The bill, imputing several acts of misconduct to the defendant Bignold, to whom the management of the business had been principally confided, prayed an account and injunction against him; and an injunction was obtained by motion *ex parte*, to restrain him from receiving money on account of the society, from acting or intermeddling in its business, and from destroying, or obliterating, the books, papers, and documents belonging to it, in his possession.

A motion was now made to dissolve the injunction. By the affidavits on both sides it appeared that the business of the society had, from its commencement, been conducted at Bignold's

ELLISON
v.
BIGNOLD.

[*507]

house, until the middle of November last, when, in consequence of some disputes, the plaintiffs determined that it should be carried on at another place, and issued an advertisement announcing the removal, and cautioning the public against making payments to Bignold; he, on the other hand, published an advertisement denying any removal, and continued to transact business at the former office, retaining the books there, and receiving some premiums. It was stated that he had torn out of a receipt-book the counterparts of some receipts he had given for premiums paid to him; this charge he explained by saying, that, being personally liable for the sums in question, *which did not amount to more than 30*l.*, he had taken these counterparts out of the general book as memorandums or vouchers for himself. It appeared that he had withdrawn from being one of the sureties for the payment of the stamps, and some of the duties had not been paid; in consequence of which proceedings against the society had been threatened by the Stamp Office. The defendant Bignold had not advanced the 10,000*l.*; he stated that he had only guaranteed that sum in the event of a deficiency of funds; and that the clause relating to it had been introduced into the engrossment of the deed without his knowledge: he also insisted that he had disbursed, for the purposes of the society, more than he had received. No auditors had been appointed according to the deed; one of the directors had died, and another had, as it was stated, become disqualified by non-attendance; but the vacancies had not been filled up.

Mr. Wetherell and *Mr. Glyn*, in support of the motion :

* * According to *Waters v. Taylor*,† and *Carlen v. Drury*,‡ a suit for account cannot be instituted by members of such a *society, until they have resorted to the modes provided by their articles. The directors have the power of making by-laws, to regulate whatever they may object to in the defendant's conduct; if he has committed any breach of trust, they may remove him. The accounts should be submitted to the auditors; they should,

[*508]

† 10 R. R. 1, 13 R. R. 91 (15 Ves. ‡ 12 R. R. 203 (1 V. & B. 154).
10, 2 Ves. & V. 299)

as a preliminary to this bill, have tried at least whether the tribunal, and the system of rules that they have mutually agreed on, are not sufficient for the purposes of justice. They cannot take from the defendant the benefit of those regulations, and apply at once to the Court, superseding the authority of the auditors, and putting the Master in his place. The inconvenience of having such a concern carried on under the direction of the Court, which must be the consequence, is obvious. This is not a case where an injunction is rendered necessary by any imminent danger of destruction; the acts complained of are of a trifling nature, and are readily explained.

ELLISON
v.
BIGNOLD.

Mr. Fonblanque, Mr. Raithby, and Mr. Shadwell, for the plaintiffs. * * *

THE LORD CHANCELLOR [at the close of the judgment, said:]

* * There are by this deed, directors, trustees, surveyors, auditors, &c. to be appointed; the general management is to be in the directors; they are to have meetings, and to be paid if they do their duty; if not, to pay forfeit; the auditors are to inspect the accounts; the directors are to say where the books shall be kept. All this should have been done, if the society had been regularly carried on, according to these articles. It does not now come before me, as if it had hitherto been conducted on the principles of the deed, but as a society that has not been, and perhaps for that reason, never can be conducted on those principles. I must consider the regulations of the deed not to have been attended to, and we must look upon it as a general partnership, not connected with, and depending on these particular stipulations; they cannot be relieved in the same way as if they had conformed to them. With these voluntary associations, the Court, before it interferes, must see that it is under an obligation to act, and that it can effectually act, for the benefit of the persons who have laid out their money in a way in which there must be so much difficulty in recovering it.

[512]

The LORD CHANCELLOR, after observing that the society was not constituted according to the deed, said, they must invest

March 9.

ELLISON
v.
BIGNOLD.

themselves with the characters, that, according to the deed, they ought to have, before they came to the Court. If they would not act upon their deed, the Court could not manage their affairs for them.

Injunction dissolved.

1822.
March 10, 12,
17, 20, 22.

Lord
ELDON, L.C.

[553]

ROWE v. WOOD.

(2 Jacob & Walker, 553—560.)

A motion for the appointment of a receiver upon a mortgagee of mines, who had become a partner by purchasing shares in them, upon the ground of mismanagement, and excluding the mortgagor from interference, refused; the parties having regulated their rights by subsequent agreement, and the mortgagee not admitting that his mortgage was satisfied.

The rights and duties of a person in that situation are not to be governed solely by principles applicable to one who stands simply in the character of a mortgagee or partner.

A mortgagee in possession of mines is not bound to expend more than a prudent owner.

If he can be deprived of the possession on the ground of mismanagement, it must be of a clear and specified nature.

On a motion for a receiver against a mortgagee, insisting by answer that he has not been fully paid, the Court will not try, by affidavits, the question whether any balance is due to him or not.

[THE defendants were mortgagees in possession of certain mines. One of the mortgagees had also acquired by purchase an interest in the mines as tenant in common with the mortgagor, who was plaintiff in the action.]

[554]

A motion for a receiver was now made. The plaintiff stated that the accounts were improperly kept, and the mines injured by mismanagement; that they would be much improved, and the produce greatly increased, by judicious expenditure and working, and that he was altogether excluded from the superintendence of them. * * On the part of the defendants, the Woods, the allegations of misconduct and mismanagement were denied; they contended that a considerable balance was due upon the mortgage account. * * *

The Attorney-General, Mr. Horne, Mr. Shadwell, and Mr. Knight, for the plaintiff.

Mr. Heald, Mr. Sugden, and Mr. Sidebottom, for the defendants.

ROWE
v.
WOOD.

THE LORD CHANCELLOR :

The great difficulty which I feel arises from not seeing upon what principle I am to interfere, in the present stage of the proceedings, to deprive the defendant of the possession of the mine, not only as mortgagee *but as partner. * * *

[*555]

If a man is mortgagee of a mine, and the mortgagor comes, as you do here, to complain of mismanagement, the first thing that requires consideration is, what is a mortgagee of a mine required to do, or what omission on his part will you call mismanagement? To put a case by way of illustration ; suppose a person is mortgagee of a mine which is likely to be much improved by a large expenditure ; if he were owner, he might speculate for himself as much as he pleased ; the advantages, whatever they might be, would be his, and if it turned out unfortunate he would bear the loss. But can a mortgagee *be required to do that ? Can he be required to risk his own fortune in speculation, and to incur hazard in an adventure which is ultimately to redound to the benefit of the mortgagor ? I apprehend that he cannot, and that at the utmost he is not bound to advance more than a prudent owner. So, taking this as the case of a partnership ; with respect to the head of mismanagement, I should like to hear to what expense a partner can be called on to go, if he happens to be a very large creditor of the partnership trade. I was the more struck with this, because I felt great difficulty in a case lately before the Court, in which Miss Vane was tenant for life of certain collieries in the county of Durham ; when it came to be considered by the Master what part of the property was to be expended in coal adventures, considerable difficulty occurred. She was tenant for life of the mines, and was therefore bound to work them with due care and attention to the interests of those who were to come after ; but what was due care and attention on her part, and on that of the Court who had to manage them, and what was risk and speculation, was very difficult to settle. There must be clear mismanagement, therefore, of a particular and specified nature, if the case is to be put upon that.

[*556]

ROWE
v.
WOOD.

[*557]

With respect to the circumstance of the defendant being both mortgagee and partner, it is one which, if the facts were clear, deserves a good deal of consideration. As a mortgagee, he would have certain rights, and if he filled that character only, would be bound to account with the mortgagor in a particular and special manner; and it is no inconsiderable hardship on him, that he must account not only for what he has made, but for what without his wilful default he might have made. As a partner, he would not be obliged so to account; and a question may arise hereafter, whether *the account should be directed upon the principle of partnership only, or whether a decree can be framed partly upon the principle of partnership, and partly, if I may so express myself, upon that of mortgageeship. If a mortgagee chooses to become a partner, the management must be considered with reference to the benefit of the other partner, as well as to the rights of mortgagor and mortgagee; and it will be difficult to make out that the mortgagee can wholly exclude his partner from interference in the partnership. * * *

March 20.
—

Considering the question as between mortgagor and mortgagee, I do not know of any instance where a mortgagee in possession has said by answer that any thing was due to him, that† the Court has tried upon affidavits against the answer, whether that was true or not. In *Beckford's* case,† I said that if he would swear sixpence was due, I would not appoint a receiver. It is impossible for the Court to go on, if it is thus to try the question of the account between mortgagor and mortgagee.

March 22.
—

[*558]

The original connection between these parties was that of mortgagor and mortgagee; and if a receiver or manager is to be appointed, in other words, if the possession is to be taken from the mortgagee, it must be on such grounds as this Court acts upon in such cases; and if it is not, therefore, clearly shewn, that the mortgagee is fully paid, and that almost by his own admission, *this Court will not deprive him of the possession. * * *

But I do not look at this case as one simply of mortgagor and mortgagee: under the agreements for the purchase of certain

† *Sic*, though grammar requires † See 21 R. R. 266.
“and.”—F. P.

shares in the mine, which, although Wood was desirous of getting rid of, must stand until set aside by decree, the parties became partners; subject to Wood's demand on Rowe's share for the balance of his account. If they had been merely partners, and no rights had been created by the relation of debtor and creditor, the case would have been very simple; one partner cannot exclude another from an equal management of the concern; and it is the duty of each to keep precise accounts, and to have them always ready for inspection, and, in short, to keep good faith towards each other.

Rowe
v.
Wood.

[The remaining part of the judgment dealt with certain special circumstances, which are not material for the purpose of this report. His Lordship concluded by saying:]

At present I do not see my way to appoint a receiver; but I think that Rowe, subject to the equities which may be ultimately declared between the parties, has a clear right to insist that regular accounts shall be kept of all receipts, payments, transactions, and so on, relative to the mine, and to have constant access for the purpose of inspecting the accounts; and also, that, subject to *those equities, he has a clear right to control the working of the mines; and if he is impeded in the exercise of any of these rights, let him come to the Court again: the application, after the other parties have been apprised of what the Court expects them to do, will be differently treated.

[559]

[*560]

HARRISON v. GURNEY.

(2 Jacob & Walker, 563—565.)

Trustees for creditors, after a decree for the execution of the trusts, restrained from proceeding in a suit in the Court of Chancery in Ireland, having the same objects.

1820.
Dea. 16, 18.
1821.
March 22, 27,
29.

Lord
Eldon, L.C.

[563]

THIS was a suit by some creditors claiming under a trust deed of the 21st November, 1811, executed by the Marquis of Headfort, and his son Lord Bective; a decree had been made in November, 1816, for the execution of the trusts, which was in prosecution in the Master's office, and a receiver had been appointed of the estates comprised in the deed, some of which

HARRISON
v.
GURNEY, were situated in Ireland. A motion was now made on the part of the plaintiffs, for an injunction to restrain the defendants, Gurney and Bentley, two of the trustees, from proceeding in a suit commenced by them in the Court of Chancery in Ireland, the bill in which was filed in June last, and prayed the execution of the trusts of the deed of November, 1811, a sale of the estates, and a receiver ; the answers had not been put in.

Mr. Hart and *Mr. Sugden*, in support of the motion, suggested that the object of the suit in Ireland, was to embarrass the proceedings here, and to prevent the trustees' accounts being fully investigated, and that it was probable some endeavour would be made to get the possession of the Irish estates out of the hands of the receiver.

Mr. Wetherell and *Mr. Tinney*, on the other side, desired that the motion might stand over, to procure some information from Ireland, which the LORD CHANCELLOR permitted, upon their undertaking to do nothing in the mean time.

1821.
March 22, 27. On the motion being brought on again, it was stated by
[564] *Mr. Tinney*, that the trustees had been under the necessity of instituting a suit in Ireland for the purpose of calling the receiver of the estates situated there to an account ; but that they had found that the Court of Chancery there would not entertain the suit, unless it extended to a general administration of the property. They had, therefore, commenced the suit in question, intending it to be subsidiary to the English suit, and only to be enforced so far as regarded the receiver's accounts. He proposed that it should be referred to the Master, to enquire whether it was fit that the suit should be continued, or any other proceedings commenced.

The LORD CHANCELLOR said, it struck him, that the view which had been taken of the subject in Ireland was incorrect. If there was a receiver in Ireland, the trustees might file a bill against him for an account, without making it a general suit. His Lordship added that he would consult Lord REDESDALE.

The LORD CHANCELLOR granted the injunction, restraining the trustees from proceeding in the second suit, saying he thought there was no reason for it. If they wished to call the receiver to an account, they might do so, but if they thought that they must connect with that a suit for the execution of all the trusts of the deed, he was of opinion that a suit to that extent was unnecessary, and that they ought not to go on with it.

HARRISON
v.
GURNEY.
March 29.

* * * * *

CECIL v. BUTCHER.†

(2 Jacob & Walker, 565—579.)

Bill seeking relief upon the loss of a conveyance, executed to give a colourable qualification to kill game retained for a year, with liberty to bring an action.

A conveyance executed by a father, to give a colourable qualification to his son, is kept in his possession during his life without being used, or made known to the son. Whether it is valid at law. *Qu.*

A voluntary deed, never parted with, and executed for a purpose that has never been completed, is considered in equity as an imperfect instrument.

1821.
March 20, 21,
29.

Rolls Court.
PLUMMER,
M.B.

[565]

THE bill stated that the plaintiff's father, Joseph Cecil, being seised of a freehold estate at Little Sheffield, in the township of Eccleshall, by indenture dated the 1st of August, 1807, in consideration of natural love and affection for the plaintiff, his son and heir apparent, and for his advancement, preferment, and present maintenance, covenanted to stand seised of his messuages, lands, and hereditaments in the township of Eccleshall, in the parish of Sheffield, in the county of York, to the use of the plaintiff in fee. He continued in possession of the premises comprised in the deed, and of the deed itself, till his death in the year 1813; upon which the defendants, the trustees of his will, and his wife and children of a second marriage, entered into possession. The bill charged, that the plaintiff was unable to try his right to the premises at law, by reason of the deed of August, 1807, *being in the power of the defendants, and prayed

[*566]

† See *ante*, p. 180.

CECIL
v.
BUTCHER.

that they might deliver possession with the title deeds, and an account of the rents and profits from the date of the deed.

It appeared in evidence that J. Cecil, the father, had, in July, 1807, given instructions to his solicitor to prepare a conveyance of his property in Eccleshall to the plaintiff, saying at the time, that he had a pack of hounds, and that he wished to give his son a qualification to hunt with them, and to shoot; and that the Eccleshall estate would be sufficient for that purpose; he desired the deed might be ready for execution when he next came to Sheffield, which he said would be soon, as he was afraid an information would be laid against the plaintiff, by a gentleman in the neighbourhood, for hunting or shooting, and he wished the qualification to be in readiness. The deed was prepared according to a draft, which was produced in evidence, and executed by Cecil at the solicitor's office in Sheffield. He took the deed away with him, and on his setting out to return to his residence at Dronfield, about six miles from Sheffield, left it in the hands of J. Butcher, with directions to keep it till he should next come to Sheffield: about a week after he called for it and took it away. Butcher, who was an attesting witness, understood that it was a qualification to enable the plaintiff to kill game. Cecil had mentioned to other persons that he had qualified his son; he had said to one witness, in the year 1810, that he had qualified the plaintiff, by making a deed of gift of the Little Sheffield estate to him, but he did not wish him to know it, for fear he should go beyond bounds. There was no trace of the existence of the deed after the time that it was re-delivered by Butcher to Cecil; the defendants had not found it among Cecil's papers on his death, and disclaimed all knowledge of it.

[567]

J. Cecil, by his will, dated in 1811, gave all his real estates, and the residue of his personal estate, to trustees, upon trust to pay an annuity of 300*l.* per annum to the plaintiff, and subject thereto, and to some other payments, upon trust for his wife till her death or marriage, and afterwards, as to the real estates, upon trust for the benefit of his younger children. The will gave several powers to the trustees, amongst which was one authorizing them, during the minority of any person entitled to the estates, to dig the coals and other minerals to which the

CECIL
 &c.
 BUTCHER.

testator was entitled within and under his said estates, or the estates of any other person or persons within the parish of Dronfield or at Little Sheffield, in the counties of Derby and York. There was a declaration that, after the death or marriage of his wife, the trustees should stand possessed of his leasehold estates situate at Little Sheffield, or elsewhere in the county of York; and of the residue of his personal estate, in trust, to permit the same to be enjoyed by the person for the time being entitled to his real estates. The defendants insisted that the estate in question was intended to be comprised in the general devise of all the testator's real estates, and that if the deed of August, 1807, was established, the plaintiff was bound to elect between the estate claimed by him, and the annuity given him by the will. It was in evidence that the testator had, in fact, no leasehold estate at or near Little Sheffield. The estate at Little Sheffield was stated to be worth about 140*l.* per annum, and the testator's other real estates about 800*l.* per annum, according to one statement; according to another, his property altogether was about 600*l.* per annum.

Mr. Heald and *Mr. Parker*, for the plaintiff, cited *Doe d. Roberts v. Roberts*,† as establishing that a deed *having been made to give a colourable qualification is no ground of objection to its validity. [*563]

Mr. Horne, *Mr. Preston*, and *Mr. Seymour*, for the defendant. * * *

Mr. Heald, in reply. * * * [569]

[The cases cited by counsel are stated in the judgment.]

THE MASTER OF THE ROLLS :

[570]

This is a bill by the eldest son of Joseph Cecil, deceased, claiming the benefit of a deed executed by his father, purporting to give him an estate in fee simple; the plaintiff coming into equity to obtain legal relief, on the ground of the loss of the

† 20 R. R. 477 (2 B. & Ald. 367).

CECIL
v.
BUTCHER.

instrument. The case is of considerable importance from the number of conflicting authorities upon the subject.

The facts appear to be these. The father was a gentleman possessed of an estate of about 600*l.* a year, who kept a pack of hounds; and he was apprehensive that his son, who was also fond of the diversion of sporting, might become the object of a prosecution as an unqualified person. He therefore gave to his attorney verbal directions for a conveyance; he, in consequence, prepared a draft, which on the face of it appears to require some explanation, from the various erasures, and from the estate tail having been changed to an estate in fee. The instructions were only to make a conveyance to qualify him, not expressing what estate was to be given. But I think it fair to suppose that the gentleman, finding the property to be worth about 140*l.* per annum, and that though by the statute an estate of 100*l.* per annum is a qualification, yet, that if it be a life estate, the value must be 150*l.*, thought it best that it should be an estate of inheritance; and he probably preferred an *estate in fee, to an estate tail, because it might be more easily got back again.

[*571]

I think it is clear upon all the evidence, that the object was singly to qualify the son to kill game. In giving directions to his attorney, he said, that he was afraid of an information, and was desirous that the qualification should be in readiness; and the attorney accordingly states, that in August he called and executed the deed. It is said, this general expression does not necessarily imply that it was sealed and delivered; but I think there is no weight in the objections. The witness, as an attorney, must know the meaning of the word, it would be a great misrepresentation if he used it in any sense, except that which is the ordinary one, and that in which it is used in the pleadings. We must, therefore, take it to have been properly executed, and, consequently, to have been a complete and valid deed; and this draft, with all its obliterations and alterations, is sworn to be an exact copy. The attorney says he did not retain the possession of the deed longer than while Cecil remained at his office, but he delivered it to Cecil when he went away; from which it appears that it must have then been in the possession of the attorney; Cecil handed it over to him after executing it. He redelivers it

to Cecil, who gives it to Butcher to keep for him for a few days. This temporary possession by Butcher, the friend of Cecil, and with an express direction to keep it for him, was little more than if he had kept it himself; all this is, however, of no importance with respect to the legal validity of the deed.

CECIL
v.
BUTCHER.

It is, I think, evident that Cecil never communicated this transaction to his son; he was anxious that he should not know of it. He does not appear ever to have parted with the deed, but retained it in his own possession. *On his death it was not found among his papers; it was probably either lost or destroyed. The deed is recited to have been made for the advancement and present maintenance of the son; notwithstanding which, the father continued in possession and enjoyment of the estate till his death. By his will he makes another provision for his son, who, having afterwards found this copy of the deed, files this bill.

[*572]

The question is, whether the Court ought to give relief on the case thus made by the plaintiff. If we were to determine *in foro conscientiae*, whether it was the intent of the father to transfer the right, or only to have a deed ready to be used as a qualification, if wanted, the evidence would be very strong to shew that there was no design of transferring the ownership, that the object was special, that it was made to be in readiness for a particular purpose, consistently with which, the father might continue in possession. In a court of law, the only question is, whether the deed is valid; and there can be no enquiry how far it is honourable or equitable to insist upon it. If the deed is complete, whether it is a qualification to sit in Parliament, as in the case of *Colonel Pitt*,† or to kill game, as in *Roberts v. Roberts*, the party cannot be heard to allege his own fraudulent purpose, it being a fraud upon the law to attempt to give another a qualification without making him owner of the estate; he is estopped from confining the operation of his deed, by avowing that he had such a purpose. In *Curtis v. Perry*,‡ Lord ELDON mentions a case where Lord KENYON dismissed a bill to have a reconveyance of an estate given as a qualification to sit in Parliament. In the case of *Curtis v. Perry* itself, ships being

† Cited Amb. 266.

‡ 6 R. R. 28 (6 Ves. 739).

CECIL
v.
BUTCHER.
[*573]

registered in the name of one partner, it was held that the other, or those *claiming under him, could not allege that he was interested in it, and explain away the effect of the registry, by stating it to be for the purpose of evading an Act of Parliament.

The doctrine of courts of law in these cases is well settled; but we are here in a court of equity, and we must consider the subject with reference to the numerous authorities upon it, and must attend to the principle to be collected from them. They have not depended singly upon the question, whether the party has made a voluntary deed; not merely upon whether, having made it, he keeps it in his own possession; not merely upon whether it is made for a particular purpose; but when all these circumstances are connected together, when it is voluntary, when it is made for a purpose that has never been completed, and when it has never been parted with, then the courts of equity have been in the habit of considering it as an imperfect instrument. If it was understood between the parties, that it should only be kept in readiness to be used if wanted, or if it is made *ex parte*, and never intended to be divulged to the grantee, unless the particular purpose requires it; the question is, whether there is not then a *locus pœnitentiæ*; if, under such circumstances, the grantee furtively gets possession of the deed, though it is good at law, yet he has obtained it contrary to the intention of the grantor, who never meant him to have it; and will not a court of equity, at least, refuse him its assistance? This principle will be found to pervade all the cases. It may, perhaps, when the transaction is known to both parties, rest upon the supposition of a collateral agreement between them, that the deed should not be used,—should not be called forth into life, unless wanted for the special purpose, and that the deed being executed on the faith of that agreement, it is contrary to good conscience and equity to *call for it, and apply it beyond the purpose for which the grantee knew it to be intended.

[*574]

The first case is *Ward v. Lant*,† where the father executed a bond to his daughter, to screen himself from taxes, always kept it by him, though it was made payable immediately: this circumstance of the grantor keeping the possession of the instru-

† Prec. in Ch. 182.

CROIL
v.
BUTCHER.

ment, and never delivering it to the grantee, is a very material feature in all the cases. The Court then considered all the circumstances as evidencing an incomplete transaction; the LORD KEEPER thought, that if the daughter had got possession of the bond, equity would have relieved, going a step further, than the defendant here requires by setting the bond aside. There is another case in the same book, *Barlow v. Heneage*,† which, as far as it goes, is an authority on the other side; a father having made a voluntary settlement and bond in favour of his daughters, kept them in his possession, and received the rents and profits till his death; it was decided by the same LORD KEEPER, and considering, from all the circumstances, that the transaction was complete, he said, they must be treated as the father's deeds, and decreed them to be carried into execution.

The next case is *Clavering v. Clavering*,‡ where the Court would not relieve against a voluntary settlement, on the ground of the settlor not having acted on it, and having made another settlement; *Lady Hudson's* case is there cited, where a father, displeased with his son, made an additional jointure on his wife, and afterwards cancelled the deed; she, notwithstanding, recovered upon it. In these two cases, it is to be observed, that the deeds were not made with the view of being brought *forward at a future time, for a particular purpose; they were complete at the time, though the parties afterwards repented.

[*575]

The next case is *Naldred v. Gilham*.§ It is true, that the LORD CHANCELLOR there lays some stress upon what he conceives to have been a degree of imposition practised on the lady, who made the settlement. But I do not see any evidence that she gave instructions for a revocable instrument, and that another was prepared. She seems to have supposed, that keeping the deed in her possession, would keep the estate in her power. It does not appear, that she signed a deed different from what she intended, but that she did not know the legal effect of it. The case is cited by Lord HARDWICKE, in *Boughton v. Boughton*,|| as a case to be followed; he states the circumstances of it, and

† Prec. in Ch. 210.

‡ 2 Vern. 473.

§ 1 P. Wms. 577.

|| 1 Atk. 625.

CECIL
v.
BUTCHER.

mentions, as one of the reasons of the decision, that the keeping the deed by her, implied an intention of revoking.

The next case, in order of time, is *Cotton v. King*: † the LORD CHANCELLOR there said, that if the Lady Cotton, after executing the deeds, kept them in her own power, and they had been got from thence, she should not have been bound by them, and so, if they had been in her agent's hands. In this case, Butcher was the agent of Cecil. But the point which the LORD CHANCELLOR thought of most weight against Lady Cotton was, that she had declared an intention to put it out of her power; that, he thought, took it out of that line of cases where the Court considers the deed imperfect, and not meant to be followed up by any practical result. The same principle is to be found in the subsequent case of *King v. Cotton*; ‡ though these cases, at the utmost, are rather **dicta* than decisions, having finally turned upon other points.

[*576]

Birch v. Blagrove, § decided by Lord HARDWICKE, is a strong case. His Lordship begins, by saying that he lays aside all considerations of fraud and trust; and so I think that here all such considerations are to be laid aside: we are not to view the plaintiff as a *particeps criminis*; he was not a party contriving this sham conveyance; it was the father's act only. Lord HARDWICKE mentions, as the distinguishing feature of the case, that the father, who executed the deed, to avoid serving the office of sheriff, had not actually taken the oath. If the deed had been acted on, it would have been too late to get it back; but, in the mean time, he considered it as preparatory only. On this principle, he says, that in the case of *Colonel Pitt*, if he had never sat in Parliament by virtue of the conveyance, he should have thought that the decision ought to have been different, and he recognizes the authority of *Ward v. Lant*. This then was a case where Lord HARDWICKE, sitting in a court of equity, thought himself warranted not only in refusing relief upon a voluntary conveyance, kept in the possession of the settlor, and intended for a purpose that did not take effect, but interposed to set it aside. There is another case entitled to less authority, that of

† 2 P. Wms. 358.

§ Amb. 264.

‡ 2 P. Wms. 674.

Platamone v. Staple (G. Cooper, 250), where a conveyance was made to give a qualification, but was never applied to that purpose; it was thought upon that ground that there was sufficient doubt to grant an injunction till the hearing: it is not therefore an absolute decision.

CROIL
v.
BUTCHER.

[*577]

The case of *Roberts v. Roberts*,† in the Exchequer, may certainly be said in some measure to call in question *the importance of the circumstance of the deed not having been used. The LORD CHIEF BARON states the strong inclination of his opinion to be, that that circumstance was not a sufficient ground for calling it back: but it is to be observed that in that case, as in *Platamone v. Staple*, the Court had granted an injunction. The testator also had there delivered the deed to his brother; he had put it out of his power. It was also undoubtedly a case where both parties were engaged in the transaction: if it was a fraud upon the law, they were equally conusant of it; and the Court might therefore well say that it would assist neither. When it came on for trial at Nisi Prius, the learned Judge thought the deed was void: the Court of King's Bench, however, granted a new trial; the LORD CHIEF JUSTICE observing as a distinction, that in *Birch v. Blagrove* and *Ward v. Lant* the deeds had never been delivered. With respect to *Platamone v. Staple*, he says, that the party might very likely have intended to give a rent-charge only in the event of the defendant's becoming a member of Parliament; and BAILEY, J. observes upon the same case that it was executed for a special purpose which never took effect, thus recognizing the distinction on which that case was decided. *Roberts v. Roberts* is therefore distinguishable from this case; there the deed was complete; it was to stop a prosecution then pending, and had actually been delivered into the hands of the donee.

In addition to these cases there is that of *Brackenbury v. Brackenbury*,‡ which is distinguishable in one respect; a fraud having certainly been practised in getting possession of the deed. The VICE-CHANCELLOR thought that as the ejectment might be defeated by setting up an outstanding term, the plaintiff ought to be restrained from setting it up: the LORD CHANCELLOR intimated his opinion, that it was a case in which he would relieve

† 18 R. R. 733 (Daniell, 143.)

‡ *Ante*, p. 180.

CECIL
v.
BUTCHER.
[*578]

*neither party; and that the plaintiff could therefore not be restrained from using the term; or that, at least, if it could be done, it must be by bill.

This is a view of all the cases; and difficult as it may be to extract a principle from them, yet I think there is a great preponderance of authority in support of the proposition, that in a case where a voluntary deed is made without the knowledge of the grantee, when it is made for a special purpose for which it was never required to be made use of, when it has been kept in the hands of the grantor without ever being acted on, a court of equity will not relieve upon it. My only doubt is, whether I should not take the same course as in *Roberts v. Roberts*, by allowing the plaintiff to proceed at law; for if he should substantiate his title at law, it may be a question whether he may not resort back here for the title-deeds and the account of the mesne profits. The plaintiff's case, indeed, may as easily be established at law as in equity: the deed being lost, and the plaintiff having a copy of it, wants nothing but a discovery whether the defendants have it; and they admit it to be lost, there is therefore no difficulty at law. It is not a ground for dismissing a bill, that the party has come into equity for relief, when his case required a discovery of the loss of the deed, because originally there was not, as there is now, the same facility in recovering in such cases at law as in equity. The loss gives a right to proceed in this Court to recover the property; but then a case must be made out for equitable relief; which has not been done here.

[*579]. On the second point, I think that there is enough to put the plaintiff to his election if he should succeed at law. It is clear that the estate is by mistake described as leasehold, the testator having no other estate at the *place. The latter passage in the will is quite inexplicable, unless it refers to this estate, and unless he considered it to be included in the previous devise. Though he had conveyed it away, yet if he conceived it to be his, and treated it as such, then it is the common case of one person giving away the estate of another; if there was an intent to pass it, it comes within the case in Ambler.† I only throw

† *Birch v. Blagrove*, Amb. 264.

out this, which is my present impression, as it may be the means of saving the parties some expense.

If the plaintiff succeeds at law, and the defendants should apply to restrain him from proceeding on the judgment, that will be a very different question, which I do not now decide. At present I will retain the bill for a year, with liberty for the plaintiff to bring an action: he does not want any admission from the defendants except that of the deeds being lost: but I think, upon the whole, it will be best not to impose any terms upon them.

CECIL
v.
BUTCHER.

1821.
Jan. 16.

EX PARTE SMITH, IN RE HAY.

(6 Maddock, 2; S. C. 1 Gl. & Jam. 74.)

LEACH, V.-C.
[2]

If a managing partner draws out monies, and conceals the fact, or disguises it in the partnership books, this is fraud, and proof may be made against his separate estate. Otherwise, if the transaction is duly entered in the books.

THE question in this case was, whether the joint estate should prove against the separate estate.

THE VICE-CHANCELLOR :

If one partner be entrusted with the entire management of the partnership concern, and he withdraws monies for his separate use, which he duly and openly enters in the partnership books, this is not a fraud which will entitle the joint estate to prove against the separate; it would be otherwise, if by the entries in the books he disguises the transaction, or wholly omits and conceals it.

1821.
Feb. 6.

BRAY v. FROMONT AND OTHERS.†

(6 Maddock, 5.)

LEACH, V.-C.
[5]

A partner may give to a third person an interest in his share, but cannot make him a partner.

THE three defendants worked a coach from London to Bath, each finding horses for certain stages.

Smith, one of the defendants, employed the plaintiff to provide horses for a part of his distance.

The present bill was for an account, and payment of a proportionate share of profits.

THE VICE-CHANCELLOR held, that the plaintiff, claiming under Smith, must be subject to the account between Smith and the other defendants, and could claim payment only out of any balance due to Smith; but that it would be otherwise if the co-defendants had accepted him in the concern in lieu of Smith.

† *Cusells v. Stewart* (1881) 6 App. Cas. 64, 75. See now the Partnership Act, 1890, s. 31.

COFFIN *v.* COFFIN.

(6 Maddock, 17—18.)

1821.

March 8.

[This case reported on appeal in Jacob, 70, will be found in volume 23 of the Revised Reports.]

[17]

REYNOLDS *v.* NELSON.

(6 Maddock, 18—26.)

1821.

March 5.

The plaintiff agreed to take a house of the defendant for two years. Afterwards on the 4th September, 1817, he agreed to buy the estate of the vendor, in consideration of 25*l.* paid down, and of the further sum of 425*l.* to be paid on the 25th December, 1817, on or before which time the conveyance was to be executed. An abstract was delivered on the 20th October, 1817, and afterwards, a draft of the conveyance, with the abstract, was sent to the plaintiff, with a note of the defendant's solicitor, stating that the deeds were with him, and desiring to hear from the plaintiff if any objections occurred; and many ineffectual applications were made to see the plaintiff. A notice was served on the plaintiff on the 22nd December, 1817, that the defendant would on the 23rd, 24th and 26th, attend at the plaintiff's house to execute the conveyance, and, on default, he should consider the plaintiff as refusing to proceed in the purchase, and act accordingly. On the 2nd April, 1818, the plaintiff returned the abstract, with objections to the title. On the 13th the defendant distrained on the plaintiff for rent. On a bill filed by the purchaser for a specific performance: Held, that the vendor should have given notice that he considered the agreement as at an end, and should have returned the 25*l.*; and not having done so, the Court directed the usual reference as to the title.

LEACH, V.-C.

[18]

[THE above head note contains a sufficient statement of the facts for the purpose of explaining the following judgment:]

THE VICE-CHANCELLOR :

[26]

It may now be considered as the settled doctrine of the Court, that, by the terms of the agreement time may be made of the essence of the contract. It has not, however, been decided, that where there is no special stipulation in the contract, time may be made essential by subsequent notice that it will be so considered; and, in this case, I may leave that point untouched.

The notice given in this case was not that the defendant would consider the contract at an end if it was not completed within the time, but that he would consider its not being completed

REYNOLDS
vs.
 NELSON.

within the time as equivalent to a refusal to perform it, and would act accordingly; but whether he would act as if the contract were abandoned, or would act by filing a bill for a specific performance, he leaves wholly in doubt; and it is to be observed, that he neither returned nor tendered the deposit which he had received. There must, therefore, in this case, be the usual reference as to the title.

1821.
 March 5.

MORSE v. MEREST.†

(6 Maddock, 26—27.)

LEACH, V.-C.

[26]

Where there is a contract to sell at a valuation by A. B. and C. the Court will compel the vendor to permit the valuation. The time of valuation is of the essence of the contract, but the defendant cannot take advantage of it, if he improperly occasion the delay.

THE plaintiff and defendant entered into a written agreement for sale by the defendant to the plaintiff of a considerable estate at twenty-five years' purchase, on an annual value to be set by A. B. and C. three persons named in the agreement, on or before a certain day.

[27]

The valuation had not been made accordingly; but it appeared in evidence that the defendant had prevented the valuation being made on or before the day named.

Mr. Trower, Mr. Bell, and Mr. Roupell for the plaintiff.

Mr. Horne, and Mr. Girdleston, for the defendant.

THE VICE-CHANCELLOR held, that in the case of a reference time was as essential in equity as at law; but that in equity a defendant was not permitted to set up a legal defence which grew out of his own misconduct, and that this agreement was now to be acted upon as if no time were limited, or the time was not passed. That a man who agreed to sell at a price to be named by A. B. and C. could not be compelled by a court of equity to sell at any other price; but it appearing that the defendant refused to permit the referees to come upon the land, the Court

† See *Milnes v. Gery*, 9 R. R. 307, and the cases there noted.

had jurisdiction to remove that impediment, and would decree that the defendant should permit the valuation to be made according to the contract; and if it were so made, then a supplemental bill must be filed for a specific performance upon the terms of their valuation.

MORSE
v.
MEREST.

POOR v. MIAL.†

(6 Maddock, 32.)

1821.
March 13.

A bequest of leasehold property, with a condition to assign a part to a charity.

LEACH, V.-C.

[32]

The legatee takes, discharged of the condition.

A TESTATOR made a general bequest of leasehold property, upon condition that the legatee should assign a certain leasehold estate, part of the property, to a charitable purpose. It was contended, that as to the leasehold given to the charity, the legatee was a mere trustee, and the trust being void, the leasehold belonged to the next of kin.

Mr. Bell, Mr. Glynn, and Mr. Oliphant, were counsel in this case.

THE VICE-CHANCELLOR:

There is here, in the first place, an absolute gift of the whole leasehold property, upon an illegal condition to assign a part; it is the same thing as if the illegal condition had been to pay a sum of money to a charity; in such case it is clear the legatee would have retained the whole leasehold property, without payment of the sum of money, and therefore he must retain the whole, without the assignment of a part.

† *In re Tyler* (1891) 3 Ch. 252, 60 L. J. Ch. 686.

1821.

March 14.

CLIFFORD v. LEWIS.†

(6 Maddock, 33—38.)

LEACH, V.-C.

[33]

The words, “I will and direct that my just debts, funeral and testamentary expenses, be paid and satisfied,” in the introductory part of a will, amount to a charge of the debts upon the real estate.

THIS cause came on for further directions upon the Master’s report, by which it appeared that the testator’s personal estate was insufficient for the payment of his debts; and the question was, whether the testator had by his will charged his real estate with the payment of the debts? The will was thus: “I will and direct that my just debts, funeral and testamentary expenses, be paid and satisfied. Whereas I have by deed poll, dated the 14th day of November, 1812, under my hand and seal, in pursuance and exercise of a power given to me for that purpose in and by the last will and testament of my late father William Morgan Clifford, deceased, limited and appointed certain freehold estates, called Perristone and Snogsash, the Camp and Fockle, situate in the parishes of Foy and Upton Bishop, in the county of Hereford, with their appurtenants, to the use of my beloved wife Sophia, and her assigns, for her life, for her jointure, and in bar of dower: And whereas by virtue of the said last will and testament of my said late father, my mother is entitled to hold the said estates for her life-time; now, for making some more certain provision for my said wife, I do hereby give to my said wife, and her assigns, an annuity or clear yearly sum of 600*l.* of lawful British money, clear and above all taxes and deductions for property tax or otherwise, to be paid and payable to her my said wife, and her assigns, by four equal quarterly payments, on four days of payment in the year, the first payment thereof to begin and be made on the quarter-day next ensuing the day of my decease. And I hereby subject and charge all my messuages, farms, and lands, situate in the counties of Monmouth and *Gloucester, to and with the payment of the said annuity or clear yearly sum of 600*l.* as aforesaid;

[*34]

† The general charge thus implied may be controlled by an express charge subsequently imposed on a particular estate: *Corser v. Cartwright* (1873) L. R. 8 Ch. 971; affirmed on independent grounds, L. R. 7 H. L. 731, 45 L. J. Ch. 605. —O. A. S.

and give to my said wife, and her assigns, full power to recover and compel payment of the same from time to time by distress, as in cases of distress for rents in arrear ; provided always, and I do hereby will and direct, that when my said wife or her assigns shall become entitled to the possession of the said Herefordshire estates so as aforesaid limited in jointure to her, then the said annuity of 600*l.* shall cease and determine, and be no longer payable ; and my said estates in Monmouthshire and Gloucestershire shall be discharged from all future claims or payments on account thereof (except as to any part or parts thereof that may happen to be then unpaid). I also give and bequeath to my said wife the sum of 1,000*l.* to be paid to her within three months after my decease. I give and bequeath to my daughter Fanny Elizabeth Mary Clifford, the sum of 6,000*l.* Also, I give and bequeath to such other my younger child or children as may be living at the time of my decease, or with which my said wife may be then *ensient*, the sum of 6,000*l.* a-piece. And I hereby charge and make subject all my said messuages, farms, and lands, situate in the said counties of Monmouth and Gloucester, to and with the payment of the said several sums of 6,000*l.* to each of my younger children ; and will and direct that the same shall be payable to my younger children upon their respective attainment of the age of twenty-one years, or being a daughter or daughters upon their attaining such age, or upon their respective days of marriage. And I will and direct that the said several sums of 6,000*l.* a-piece, hereby given to such younger children as I may have at my decease, or with which my wife may be then *ensient*, shall bear and carry interest at the rate of five per cent. per annum, until the said principal sums *shall respectively become payable ; and that my said younger children shall be maintained and educated as their trustees and guardians shall think fit, by and out of such interest money ; and that such parts of the said interest money as may not be expended in maintaining or educating them shall accumulate for the benefit of such younger children respectively, I hereby nominate and appoint my valued friend John Joseph Henry, Esq. my uncle Richard Lewis, Esq. and my brother William Clifford, Esq. guardians and trustees of and for the persons and propeties of

CLIFFORD
v.
LEWIS.

[*35]

CLIFFORD
 v.
 LEWIS.

all such younger children as I may have at the time of my decease, or with which my wife may be then *ensient*, and also, guardians and trustees of and for the person and property of my son Henry Clifford. And I hereby give to them the said John Joseph Henry, Richard Lewis, and William Clifford, their heirs and assigns, full power and authority to raise the said sum of 6,000*l.* a-piece for my younger children, as and when such sums shall respectively become payable, together with the costs and charges of raising the same, by sale or mortgage of any part or parts of my said messuages, farms and lands, in the counties of Monmouth and Gloucester, or either of them. And I will and direct, that in case of any such sale or mortgage, sales or mortgages, the receipt or receipts of the said John Joseph Henry, Richard Lewis, and William Clifford, their heirs or assigns, shall be good and effectual discharges and acquittances, &c. I also give and bequeath to my said wife, all my household goods and furniture of every sort and kind, including plate and linen; also all provisions and liquors that may be in or about my dwelling-house at the time of my decease, and my carriage and horses; and as to all my messuages, farms, lands, tenements and hereditaments whatsoever, and wheresoever situate, and estates and interest therein or **thereto* respectively, and all my monies, securities for money, and other property and effects not hereinbefore otherwise disposed of, I give, devise and bequeath the same unto my said son Henry Clifford, his heirs, executors, administrators and assigns. And I hereby nominate and appoint the said John Joseph Henry, Richard Lewis, and William Clifford, executors in trust of this my last will and testament."

[*36]

Mr. Fonblanque and *Mr. Wilbraham*, for the plaintiff
 [cited *Williams v. Chitty*,† *Keeling v. Brown*,‡ and other cases].

[37]

Mr. Bell, and *Mr. Buck*, *contra* :

There is no case in which a mere general direction by the testator, that his debts, funeral and testamentary expenses should be paid, has been held to be a charge on the testator's real estate. * * In *Williams v. Chitty*, Lord LOUGHBOROUGH, it is

† 3 B. R. 71 (3 Ves. 545).

‡ 5 B. R. 70 (5 Ves. 359).

true, on a will, in which words were used similar to those in the present case, held, that the real estate was charged with the debts, but he founds his decision upon *Lord Godolphin v. Pennick*,† There, the debts were expressly charged on the real estate; the words of the will being, “that all his debts and funeral expenses should be first paid and satisfied,” and then the testator proceeds to devise his estate. There, the intention was clear. Besides that, the devisees were also executors. * * *

CLIFFORD
v.
LEWIS.

THE VICE-CHANCELLOR:

[38]

In this case the testator begins his will thus: “I will and direct that my just debts, funeral and testamentary expenses be paid and satisfied;” and he then proceeds to dispose of his real and personal estate. The question is, whether this expression, with which he has commenced his will, imports a general and primary purpose, that the payment of his debts, funeral, and testamentary expenses, should precede the subsequent dispositions which he has made of his property. In *Finch v. Hattersley*,‡ the will began thus: “First, I direct that my debts, &c. &c. be paid.” In *Leigh v. Warrington*,§ “imprimis, I direct my debts to be paid.” Both these wills may be read thus: “In the first place I direct my debts to be paid.” This testator has in fact, in the first place, directed his debts to be paid, and I cannot attribute to him a different intention, because in the form of the expression he has not remarked that it was in the first place.

† See 3 R. R. 74 (2 Ves. sen. 271).

‡ In Chancery, 1797.

§ Belt's supplement to Ves. sen. Reports, p. 341.

1821.

*March 14.*SHELMARDINE AND ANOTHER *v.* HARROP.

(6 Maddock, 39—45.)

LEACH, V.-C.

[39]

Upon a bill of foreclosure, the mortgagee having been robbed of the title-deeds, payment of the mortgage money within a limited time was decreed, and on payment of the same a reconveyance was directed, with a bond of indemnity against any possible claim under the lost mortgage deed.

JAMES HARROP, (since deceased,) by indenture of demise, dated the 21st December, 1808, mortgaged to Peter Bailey, (since deceased,) certain freehold premises, to secure 300*l.* and also executed a bond as a further security. By a feoffment, dated the 5th February, 1802, he further mortgaged the same premises to Bailey for the sum of 100*l.* Peter Bailey filed a bill of foreclosure against the defendant, the heir at law of the original mortgagor, and amongst other things stated, "that on the night of the 12th February, 1813, the dwelling-house of the said Peter Bailey was broken open by robbers, who, amongst other property of great value, carried away all his title deeds, mortgage deeds, bonds, bills, notes and securities for money, and particularly, they carried away the several indentures of mortgage before stated, and the title-deeds of the said mortgaged premises, and he had never been able to recover them, or to discover where the same or any of them are, or what is become thereof; and that the mortgagor, upon hearing of the loss of the said mortgage deeds, refused to pay any further interest upon the mortgages, and accordingly such interest remained due from the 21st December, 1813." The bill then stated that the plaintiff has in his possession the several drafts from which the said deeds were ingrossed, and charged that the deeds are respectively exact copies or transcripts.

[*40]

The defendant by his answer submitted, that a reasonable time ought to be allowed to him for raising and *paying off the mortgage monies and interest; and that upon the defendant's paying off the same within such time, the plaintiffs ought to be compelled to reconvey to the defendant, or as he should direct, the mortgaged premises, and indemnify the defendant against the lost bond, and to restore to the defendant the title-deeds, evidences and writings relating to or concerning the said mort-

gaged premises, or to make to the defendant some adequate compensation for the defect in the title thereto, occasioned by the loss thereof, and prove that the same have been destroyed or really lost.

SHELMAR-
DINE
v.
HARROP.

After the filing of the bill, and the answer thereto, Peter Bailey died, having by his will devised the mortgages to Shelmardine and Hammett, in trust, and appointed them executors. James Harrop, the mortgagor, died also, whereupon Shelmardine and Hammett filed a bill of survivor and supplement against the defendant, the heir of the mortgagor.

The robbery, and the loss of the mortgage deeds and bond, were proved.

The cause came on to be heard before the VICE-CHANCELLOR, on the 31st July, 1819; and on the authority of *Stokoe v. Robson*,† it was ordered that an account should be taken of what was due to the plaintiff for principal and interest on the mortgages in the bill mentioned, and the Master was directed to inquire “what title-deeds, evidences and writings, relating to the mortgaged premises, were delivered to Peter Bailey the mortgagee, by James Harrop, deceased, or by any other person or persons by his order; and what was *become of the same,” with the usual directions in such cases.

[*41]

The Master, by his report, ascertained what was due for principal and interest; and further stated what had been deposed as to the robbery, and that none of the title-deeds, &c. were found during the life-time of Bailey, or since his decease, but that he had not been able to ascertain what particular title-deeds, evidences and writings, relating to the mortgaged premises were delivered by Harrop to Bailey, and that the same had been stolen.

The cause now came on for further directions upon the Master's report.

Mr. Bell and Mr. Gardner, for the plaintiffs :

The Master having reported that the mortgage deeds and the

† A similar case to *Shelmardine v. Harrop* (shortly reported in 3 V. & B. 51, 54), where a similar enquiry had been directed, the defendant not objecting.—O. A. S.

SHELMAN-
DINE
v.
HARROP.

title-deeds were stolen, and what is due upon the mortgages, the Court will decree that the money shall be paid within a limited time, upon a reconveyance by the plaintiffs, and an indemnity by bond; and in default of the money being paid, a foreclosure. That was the course in *Stokoe v. Robson*, when it afterwards came on before the late Master of the Rolls, upon the Master's report.†

- [42] The VICE-CHANCELLOR, by the arrangement of the parties, made
[*48] the same order as was made by Sir WILLIAM *GRANT in *Stokoe v. Robson*, expressing at the same time a doubt whether it would
[*44] not have been the best course *for a court of equity, in such cases, to have made the usual decree for redemption and reconveyance, leaving *it to the mortgagor to bring an action of trover for his title-deeds.



1821.
March 23.

WALKER v. WILDMAN.

(6 Maddock, 47—48.)

L'EACH, V.-C.

[47]

Privilege of solicitor and client extends to all communications for professional advice; but not to employment in matters not professional.

THIS was a motion that the defendant, Mrs. Wildman, might be ordered to produce letters and papers referred to in the schedule of her answer. Mrs. Wildman had stated in her answer, that the letters set forth in the schedule from her and her son, to Mr. Le Blanc, her solicitor, had passed in confidence, and in the usual course of business between a solicitor and client.

Mr. Bell, and Mr. Sugden, for the motion; Mr. Heald, Mr. Combe, and Mr. Walker, contra. * * *

The VICE-CHANCELLOR refused to make the order; stating, that he considered the protection to extend not merely to communications made pending an action or suit, but to every communication

† Shortly reported in 19 Ves. 385, where the matter was arranged in accordance with the MASTER OF THE ROLLS' view that an indemnity should be given against any possible claim under the lost mortgage.—O. A. S.

made by the client to counsel, or attorney, or solicitor, for professional assistance. But that the protection did not extend to cases where the counsel, attorney, or solicitor was employed in matters not professional—as in a treaty for the purchase of an estate. And he held, that the protection was the same whether the client communicated directly with his professional adviser, or through the intervention of *a third person. The case in the House of Lords, where the client was ordered to produce a case stated for the opinion of counsel, has been followed *in specie*, but not in principle.

WALKER
v.
WILDMAN.

[*48]

STITWELL v. WILLIAMS.

(6 Maddock, 49.)

1821.
March 24.

[Affirmed on appeal, as reported in Jac. 280, under the title of *Stilwell v. Wilkins*.]

[49]

NOEL v. WESTON.

(6 Maddock, 50.)

1821.
March 27.

Upon sales in Court the vendor will be compelled to surrender a copyhold in person, if it can be conveniently done.

[50]

UPON a sale of a copyhold estate in Court the vendor had surrendered by power of attorney; and now, *Mr. Sugden*, for the purchaser, moved that he might surrender in person.

Mr. Hart, contra.

The VICE-CHANCELLOR held, that although at law a surrender by power of attorney cannot be questioned, yet as it in truth imposes a greater difficulty of proof of title upon the purchaser, and may expose him to a question, whether the power of attorney had not been revoked, this Court, where the vendor comes for its aid in the sale, will compel the vendor, if it can conveniently be done, to make the surrender in person.

1821.

March 29.

EMERY v. GROCOCK.†

(6 Maddock, 54—58.)

LEACH, V.-C.

[54]

A term was created in 1711, for raising portions. There was no evidence of the portions being satisfied, but a settlement of the estate took place in 1744, and a recovery was suffered; and there was a covenant that the estate was free from incumbrances. No assignment appeared to have been at any time made of the term. On an objection to the title by a purchaser: Held, that a surrender of the term must be presumed; and that in matters of presumption, the Court will bind a purchaser where it would give a clear direction to a jury.

THE Master, on a reference as to title, reported that a good title could be made if a term created for raising portions for daughters, by a settlement on the 12th March, 1711, was assigned to a trustee for the purchaser. The question was, whether a surrender of the term could be presumed? A cesser of the term was provided in the event of the trusts never arising, but not in the event of their arising and being satisfied. There were several daughters, in whose favour the term for creating the portions was raised, but no evidence of their being satisfied. A settlement of the estate was made in 1744, and a recovery suffered; and Lord Gower, the then tenant for life of the estate, and one of the settlers, covenanted that the estate was free from incumbrances; no assignment or disposition appeared to have been made, at any time, of the term.

Mr. Benyon, Mr. Sugden, and Mr. Temple, in support of the exceptions:

After this lapse of time the portions could not be claimed, and surrender must be presumed. A jury would be directed to presume a surrender, *Doe d. Bowerman v. Sybourn*,† and *Doe v. Hilder*, in the Court of King's Bench, lately.§ It is not like a trust term which has been assigned to attend the inheritance; such a term may endure for ever; but this term was never so assigned, nor has been acted upon for upwards of a century. The deed of 1744 is seventy-six years old,—*the children had all time to claim. There

[*55]

† *In re Briggs and Spicer* (1891) 392, 61 L. J. Ch. 534.
 2 Ch. 127, 133, 60 L. J. Ch. 514; † 4 R. R. 363 (7 T. R. 2).
Mogridge v. Clapp (1892) 3 Ch. 382, § 1 B. & Ald. 782.

is an irresistible presumption that the portions had been paid previous to the settlement and covenant in 1744. * * *

EMERY
*
GROCOCK.

The probability there, that the term had not been assigned, was not so great as in this case, and yet a surrender was presumed. In *Hillary v. Waller* (12 Ves. 239), the Court presumed a reconveyance after a considerable lapse of time.† Here, for a century, the term has never been disturbed, and conveyancers have treated the estate as an estate in possession. All the cases point out this as a case where a surrender is to be presumed.

Mr. Hart and Mr. Preston, contra :

It is clear the term did exist, and no evidence is produced to shew it does not still exist. There was no provision for a cesser of the term when the portions were raised. They were not to be raised until the death of Lord Gower, which took place in 1754. There is no security for the purchaser ; he may lose his estate.

* * * * *

THE VICE-CHANCELLOR :

[57]

In this case the question on a matter of title is, whether the surrender of a term created for portions is to be presumed? There is no evidence of the portions paid ; but the parties entitled attained their ages of 21, about 60 years since, and are all dead ; and it appears by the abstract, that the family has long dealt with the estate as if there were no term, and no portion due. A court of equity will not compel the acceptance of a title where there is reasonable doubt in law or in fact. In law, strictly speaking, there is no doubt ; but, practically, there is often a doubt as to the application of settled principles. In matter of fact there is doubt, where the testimony is direct ; because it may be given *malâ fide* ; or if *bonâ fide*, by mistake : there is still more doubt where matter rests in presumption, for all presumptions may be answered. In assuming the jurisdiction of a specific performance, courts of equity are compelled to grapple with these difficulties ; and the only rule that they can adopt in cases of presumption like the present seems to be, that if the case

† *I.e.* after 140 years of possession undisturbed by any claim under a deed of indemnity.

EMERY
f.
GROCOCK.

be such, that sitting before a jury, it would be the duty of a judge to give a clear direction in favour of the fact; then it is to be considered as without reasonable doubt; but if it would be the duty of a judge to leave it to the jury to pronounce upon the effect of the evidence, then it is to be considered as too doubtful to conclude a purchaser.

[58]

There is here, first, a clear presumption that the purpose is satisfied: next, there is presumption that the necessary term was surrendered, because it is not subsequently noticed in the transaction of the family: and, lastly, there is the absence of all evidence that this term was ever applied to any new purpose. In this case, I should consider it my duty to give a clear direction to the jury, that they were bound to find the term surrendered; and I must therefore hold that there is no sufficient doubt to entitle the purchaser to be relieved from his contract.

1821.
May 2.

LEACH, V.-C.

[59]

PROSSER v. WATTS.†

(6 Maddock, 59—61.)

The loss of an old deed recited in an abstracted deed is not a defect of title where it does not appear that such deed would throw any reasonable doubt upon the vendor's title.

THIS cause came on upon exceptions on the Master's report as to title.

A conveyance, dated in the year 1753, and under which there had ever since been an undisputed possession, recited certain prior deeds as matter of title. The vendor had not in his possession or power, the deeds recited, or any copies of them, and was unable to give any evidence as to what was become of them. The purchaser for this reason objected to the performance of his contract, alleging, that the recital affected him with constructive notice of the *contents of the deeds; and that he could not safely complete his purchase without seeing that the deeds confirmed the title.

[*60]

Mr. Wingfield, and Mr. Roupell, for the exceptions.

† *Frend v. Buckley* (1870) L. R. 5 Q. B. 213, 39 L. J. Q. B. 90, **Ex. Ch.**

Mr. Phillimore, contra.

PROSSER
v.
WATTS.

THE VICE-CHANCELLOR :

There is no dispute that the recital of a deed is constructive notice of its contents ; but to say that a purchaser is not to complete his contract unless he has the actual inspection of every deed of which he has constructive notice by recital, would lead to a practical inconvenience which would be manifestly absurd. In some families title-deeds are preserved for centuries ; and if the earliest of those deeds recites a former instrument, made five hundred years since, but not now existing, it would be absurd to say that a contract is not to be enforced against a purchaser because that deed cannot be produced.

There must of necessity, therefore, be some practical limit to the operation of this objection ; and the true inquiry seems to be, in every case, whether the absence of the deed recited throws any reasonable doubt upon the title of the vendor. *Primâ facie*, it is to be presumed that the purchaser in the ancient conveyance had actual inspection of every deed recited, and was satisfied with their contents ; and further, it is to be observed, that it is not probable that a vendor would recite deeds which afforded evidence against his title. When there is no circumstance to repel the effect of these general presumptions, and when the title under the conveyance which contains the recital is fortified by sixty years undisputed possession, I think it a good *practical rule to hold, that the loss of a deed recited throws no reasonable doubt upon the title of the vendor, and that the purchaser must complete his purchase.

[*61]

Overrule the exception.

1821.
May 2.

SANDERS v. KING.

(6 Maddock, 61—65.)

LEACH, V.-C.

[61]

A bare denial of partnership is not a sufficient defence to a suit for partnership accounts. A defendant who thus seeks to resist discovery must also negative any allegations which the plaintiff has made in support of his claim to treat the defendant as a partner.

THIS was a bill for an account of the dealings and transactions of a partnership, in which the defendant, King, was alleged to have been concerned; and the defendant King pleaded to the whole of the discovery and relief, that he was no partner.

Mr. Roe, in support of the plea. * * *

[62]

Mr. Whitmarsh, contra :

It is not sufficient to plead that the defendant is not a partner; he must answer the facts charged in the bill, as evidencing the partnership. Those facts may be essential to the proof of the partnership, and may be only in the defendant's knowledge.
* * *

THE VICE-CHANCELLOR :†

[*63]

Upon this plea, the issue between the parties is, whether a partnership did, or not, exist. And the plaintiff objects, that although the defendant does by his plea affirm upon his oath that there was no partnership, yet he is not thereby to deprive the plaintiff of that right to a discovery, which the principles of a court of equity give to every suitor as to the matter in issue between the parties; and, that notwithstanding *his plea, the defendant is therefore bound to answer to all facts and circumstances stated in the bill, which may afford evidence to disprove the truth of the plea.

It is very singular that this question does not appear ever to have distinctly arisen before.

† This judgment is taken from a note supplied by the Vice-Chancellor, and subsequently read by him in a

case of *Thring v. Edgar*, 2 S. & S. 277.—O. A. S.

In the case of *Drew v. Drew*,† Sir THOMAS PLUMER decided generally, that a plea of no partner was a good plea ; but the present point was not taken.

SANDERS
v.
KING.

It is stated by Lord REDESDALE,‡ in the last edition of his treatise, as the result of several authorities, that if a plea in bar be disproved at the hearing, the plaintiff is not to lose the benefit of his discovery ; but the Court will order the defendant to be examined upon interrogatories, to supply the defect. This necessarily refers to discovery, as to the other matters of the suit, and not as to the truth of the plea, which is already disposed of ; but it marks the care of the Court to maintain for the plaintiff that advantage of discovery which is the peculiar province of a court of equity.

The discovery which a court of equity gives is not the mere oath of the party to a general fact, as partnership, or no partnership ; but an answer upon oath to every collateral circumstance charged as evidence of the general fact.

Where a defendant, therefore, pleads the general fact as a bar to the whole discovery as well as relief, either the plaintiff in the particular case must lose the *equitable privilege of discovery, or some special rule must be adopted, by analogy, in order to preserve to him that privilege.

[*64]

If a plaintiff comes into equity to avoid a legal bar, upon the ground of some alleged equitable circumstances, as in the case of a release, the defendant is not permitted to avail himself of his legal defence, so as to exclude the plaintiff from a discovery as to the alleged equitable circumstances. He may, indeed, plead his release ; but he must in his plea generally deny the equity charged in the bill, and must also accompany his plea with a distinct answer, and discovery as to every equitable circumstance alleged.

In such a case, the issue tendered by his plea is not the fact of his release ; for that fact is admitted by the bill ; but the issue is upon the equitable matter charged. Yet, inasmuch as the principles of a court of equity entitle the plaintiff to a discovery from the defendant upon the matter in issue, here we find, that notwithstanding the defendant pledges his oath that

† 13 R. R. 51 (2 V. & B. 159).

‡ P. 244.

SANDERS
v.
KING.

there is no truth in the equitable matter charged, he is nevertheless compelled to accompany his plea by an answer and discovery as to every circumstance alleged as evidence of the equity.

[*65]

This practice seems to afford a very strong analogy for the present purpose. There the defendant affirms upon his oath that there is no equitable matter to destroy the legal bar of the release; yet he is nevertheless bound to accompany his plea with an answer, and discovery as to every circumstance charged as evidence of that equity. Here the defendant affirms *upon his oath that there is no partnership; and by analogy it seems to follow, that he is nevertheless bound to accompany his plea with an answer, and a discovery as to every circumstance charged as evidence of the partnership.

Adopting, therefore, this analogy for the present purpose, it furnishes this rule, that a plea which negatives the plaintiff's title, though it protects a defendant generally from answer and discovery as to the subject of the suit, does not protect him from answer and discovery as to such matters as are specially charged as evidence of the plaintiff's title.

According to this rule, this plea being unaccompanied by an answer and discovery as to the circumstances specially charged as evidence of the partnership, should be overruled; but, being a new case, the defendant must be at liberty to amend his plea.



1821.
March 30.
May 2.

LEACH, V.-C.

[66]

STEPHENS v. BRIDGES.

(6 Maddock, 66—68.)

A mortgage term was created in 1720, for one thousand years. The executors of the mortgagee took an assignment of another mortgage term on the same premises, created in 1725, for five hundred years, and assigned both the terms to the trustees of a lady who was entitled to them, under the mortgagee's will: Held, that the term for one thousand years was merged in the reversionary term for five hundred years.

THIS case came on upon exceptions to the Master's report as to title, and on further directions. A mortgage term of one thousand years, which had been created in 1720, and on which

was due a sum of 3,815*l.* 15*s.* 11*d.* became vested in Anne Egerton, in 1757. STEPHENS
v.
BRIDGES.

In 1780, the executors of Anne Egerton, being possessed of this term of one thousand years, took an assignment of another mortgage term of five hundred years upon the same premises, which had been created in 1725, and on which was then due a sum of 2,296*l.*

In 1785, the executors of Anne Egerton assigned both these terms to the trustees under the marriage settlement of a lady who was entitled to them by Anne Egerton's will; and this settlement contained a general power of sale of the trust property. The trustees put up the property to sale, as an absolute irredeemable term of one thousand years. The purchaser objected to the title. On a reference to the Master, he reported in favour of the title. His report was excepted to.

Mr. Bell, and Mr. Sugden, in support of the exceptions.

Mr. Treslove, contra.

THE VICE-CHANCELLOR :

The argument in this case, on both sides, assumes that these trustees had an irredeemable interest in the mortgaged premises; and under the power in the settlement, the mortgaged premises were put up to sale by auction, not as a redeemable interest, upon payment of the mortgage monies, but as an absolute irredeemable interest, for a term of one thousand years.

The purchaser objects, that the trustees are not able to make him a good title to a term of one thousand years; because by the union of that term with the subsequent term of five hundred years in the same persons, the term of one thousand years is merged at law, and the term of five hundred years is the only legal subsisting term. Whether in equity it can be considered that a mortgagee for a term of years, buying in a second mortgage, subsequently secured by a term, thereby destroys his own prior security, is not now the question. Nor is it the question, whether there be any actual computable difference in value, between a term of five hundred years, and a term of one thousand years; or whether an

[67]

STEPHENS
v.
BRIDGES.

unwilling purchaser will, by the force of such an objection, escape from his contract. This purchaser submits to the Court that the vendors here have not that legal term of one thousand years which they have undertaken to sell, and he is entitled to the judgment of the Court upon that point.

When the mortgagor had granted the term of one thousand years he remained seised of the reversion, subject to that term. He had power to grant his rights as a reversioner to be enjoyed by his grantee, either absolutely, and for ever, or for any limited portion of time; and the term of five hundred years, which he afterwards created upon the second mortgage, legally invested the second mortgagee with the rights of the reversioner during the period of five hundred years, and entitled him to the immediate possession of the mortgaged premises, if the prior term of one thousand years should happen to determine at any time during the term of five hundred years, by forfeiture, or surrender.

[68]

It is a clear principle that a term merges by union with the reversion, and that the right to the term, and the right to the estate, subject to the term, cannot separately subsist in the same person.

It is settled by authority that there is no difference in this respect, whether the party is entitled to the absolute interest of the reversion, or to an interest in the reversion for a limited time.

The trustees who are the present vendors have united in them the original term of one thousand years, and the right to the reversion for a term of five hundred years. By law, therefore, the term of one thousand years is merged in the reversionary term; and whatever may be the future considerations which apply to this case, I must declare that the trustees have not a title to a legal term of one thousand years.

Exceptions allowed.

COLEGRAVE *v.* MANBY.

(6 Maddock, 72—88. Affirmed 2 Russell, 238—253.)

1821.
May 12.

LEACH, V.-C.

[72]

A tenant for life of a hospital lease settled by will was thereby directed to lay by, out of rents and profits, for the purpose of paying the fine on renewals. On application for renewal by the tenant for life an exorbitant fine was claimed, and on further application by him a renewal was positively refused. The tenant for life having died, the remainderman renewed: Held, that the estate of the tenant for life must contribute towards the expense of the renewal.

[THIS case is completely covered by later authorities, see *Maddy v. Hale* (1876) 3 Ch. D. 327. The only object of this note is to preserve the following reference to two unreported cases cited by the counsel for the executor of the tenant for life.]

* * In *Richardson v. Moore* and others, not reported, decided by the late MASTER OF THE ROLLS, on the 1st of May, 1817, a Crown lease ought to have been renewed out of rents and profits, in pursuance of a trust,† but the late Act relating to Crown property made it impossible to obtain a beneficial lease, and the MASTER OF THE ROLLS refused to make a compensation to those in remainder, out of the rents. The same point was *determined by the LORD CHANCELLOR, in *Tardiff v. Robinson*, in January, 1819, a cause which grew out of the former case of *Richardson v. Moore*, which is stated in *Tardiff v. Robinson*. In the latter case, a lease of Crown lands, settled, in trust, to pay certain annuities, and the surplus rents to T. for his life, and a fund for fines on renewal was directed to be reserved out of the rents. A renewal of the last lease from the Crown became impracticable, and it was held, that as no renewal could be obtained, no accumulation of the rents for fines could take place, and that the annuities should be paid, and the surplus rents to T. for life, for so much of the residue of the lease as remained.

[82]

[*83]

* * * * *

† This appears to have been incorrectly stated. The settlement (which was made by deed) only empowered the trustees to renew at the request of the tenant for life, and afterwards at their own discretion, and to raise

the fines out of the rent or by mortgage. The corresponding provisions in *Tardiff v. Robinson* were substantially the same: *Maddy v. Hale*, 3 Ch. D. at p. 339; and now see the Trustee Act, 1893, s. 19.—O. A. S.

1821.
March 13.

COLSTON *v.* MORRIS.

(6 Maddock, 89.)

[89]

A LEGACY was given to a father, on condition that he did not interfere with the education of his daughter.

On a bill by the father for the legacy, the Court required from him security to that effect, to be approved by the Master, and directed the costs of the proceedings to be paid out of the legacy.

1821.
March 15.

GREGORY *v.* LOCKYER.

(6 Maddock, 90.)

LEACH, V.-C.

[90]

Quære, whether a husband has a right to throw his wife's funeral expenses upon her separate estate.

THE separate estate of a *feme covert* was by the decree directed to be applied in payment of her debts and funeral expenses. The husband having actually paid them, claimed before the Master to have the money repaid by her executor.

THE VICE-CHANCELLOR made the order, considering himself as bound by the decree; but expressed a doubt whether, generally, the husband has a right to throw the wife's funeral expenses upon her separate estate.

1821.
March 17.

BIRLS *v.* BETTY.

(6 Maddock, 90.)

LEACH, V.-C.

[90]

Where it is a term of the trust that each trustee shall receive and be answerable only for a moiety, this Court does not extend the liability.

A HUSBAND selling his estate was advised by his friends to make a provision out of the purchase money for his wife. He consented to settle 400*l.* and applied to the defendant, Betty, who refused to accept the trust unless another person were named with him, and the trust money divided between them, so that each should be responsible for a moiety only. This was accordingly done,

and the trust money divided equally, by the direction of the husband and wife. The trust deed was however in the common form, and one of the trustees becoming insolvent, the wife, by her next friend, filed this bill, to charge the solvent trustee with the whole sum.

BIRLS
v.
BETTY.

The settlement was for the separate use of the wife, with remainder to the children.

The VICE-CHANCELLOR dismissed the bill, with costs, considering that the division of the trust money was a term in the creation of the trust.

ATTORNEY-GENERAL v. LLOYD.†

(6 Maddock, 92.)

1821.
March 20.

Where the purchaser of charity land, with notice, expends money in buildings, is he entitled in equity to compensation? *Quære.*

LEACH, V.-C.
[92]

THE late Mr. Herbert Lloyd purchased charity lands, with notice, and afterwards expended 2,000*l.* in building two new houses upon the site. Upon an information originally being filed against him, and continued against his devisees, restoration of the land was about to be decreed, and the question was, whether any compensation was to be made for the money expended.

The counsel for the *Attorney-General* consented to a reference to the Master, upon the principle of compensation by way of lease, as had been done in former cases where a grant or lease from the trustees of the charity had been avoided as a breach of trust.

The VICE-CHANCELLOR expressed a doubt, whether, without such consent, the order could be made. In the former cases referred to, the title of the defendant was good in law, but bad in equity, and there, the *Attorney-General* coming for equity must do equity. In the present case, the title of the defendant was equally bad at law and in equity.

† *A.-G. v. St. John's Hospital, Bath* (1865) L. R. 1 Ch. 92, 35 L. J. Ch. 207.

1821.

*March 24.*CHAMPERNOWN *v.* SCOTT.

(6 Maddock, 93.)

LEACH, V.-C.

[93]

A solicitor has a lien on papers delivered to him in that character, for all professional business, but no lien as a solicitor on papers delivered to him as steward.

A MOTION was made, that the defendant might deliver up books and papers. The defendant was a solicitor, and insisted that he had a lien upon them, and his answer stated that he received them in his capacity of steward of a manor, and not as solicitor.

The VICE-CHANCELLOR held, that though a solicitor had a lien upon all papers delivered to him in that character, not only for professional business in the matter of the papers, but for all professional business whilst they remained in his hands, yet that he had no lien, as solicitor, on papers which he received as steward.

1821.

*March 28.*PIGGOTT *v.* WILLIAMS.

(6 Maddock, 95.)

LEACH, V.-C.

[95]

A solicitor files his bill for foreclosure of an estate pledged as a security for costs. The client files a cross bill, alleging the costs demanded to have been occasioned by negligence and want of skill. Demurrer over-ruled on ground of equitable set-off.

A SOLICITOR filed a bill against his client, to give effect to a security for costs on a copyhold estate.

This was a cross bill by the client, alleging that nothing was due, and that the estate ought to be re-surrendered; for that the costs claimed would have been avoided if the solicitor had conducted himself with integrity, skill and attention.

To this bill the solicitor demurred, on the ground that the claim of the client against the solicitor for negligence or want of skill could only be tried in an action at law.

THE VICE-CHANCELLOR :

A demurrer will hold only, where, if the matter alleged be taken as true, the plaintiff has no title to relief. Taking the

matter here charged to be true, the plaintiff has a clear title to restrain the defendant from proceeding to enforce his security against the copyhold estate, leaving the plaintiff's demand for damages unsatisfied. The course which the cause would probably take, in this case, would be to retain this bill until an action for damages were tried; but there is here, taking the facts to be true, a clear case of equitable set-off.

PIGGOTT
v.
WILLIAMS.

Demurrer overruled.

WEBB v. LORD SHAFTSBURY.†

(6 Maddock, 100—102.)

1821.
May 19.

LEACH, V.-C.

[100]

Lands were vested in trustees in trust, out of the receipts and profits, to make certain payments, and lay out the surplus upon mortgage or government security, with a view to accumulation; with a bequest of such accumulations. On a petition, a real estate contiguous to the real estate of the testator was permitted, under the circumstances, to be purchased, the same to be considered as personal property.

SIR JOHN WEBB, Baronet, devised certain estates to Edward Arrowsmith, in fee, upon trust, to set, let and manage the same as he should think proper; and out of the rents and profits, after certain payments, to place out and invest, in his name, or in the names of the testator's daughter or grand-daughter, the clear surplus of the rents and profits of his real estate, upon, or by way of mortgage on real estates, or on Government securities, and to receive the interest and dividends arising therefrom; and place out and invest the same during the lives of the testator's daughter and grand-daughter, and the life of the survivor of them, in the like or any other real or Government securities; it being his intention, that during the lives of his said daughter and grand-daughter, and the life of the survivor of them, all the rents and profits of his said real estate should accumulate for the person or persons therein after named. The testator afterwards by his will disposed of such accumulations. By a decree in the cause the trusts of the will were directed to be carried into execution.

† *Att.-Gen. v. Marquis of Ailesbury* (1887) 12 App. Cas. 672, 57 L. J. Q. B. 83.

WEBB
v.
LORD
SHAFTS-
BURY.

[*101]

A petition was now presented by Edward Arrowsmith, the trustee, stating, that a sum of 111,818*l.* 2*s.* 10*d.* Three per Cents. the amount of accumulations, was standing in the name of the Accountant-General, in *trust, in the cause; and further stating, that a large estate of a Mr. Churchill, about to be sold, was contiguous to some of the testator's estates, and would be convenient to be held therewith; and it would be very advantageous to the persons who might be entitled to the estates, that the estate (Mr. Churchill's estate,) should be purchased; and therefore praying a reference to the Master, to inquire whether it would be for the benefit of all persons who might be entitled to the estate of the testator, and to the accumulations, that Mr. Churchill's estate should be purchased by the petitioner, (in case Parliament should authorize the investment of the trust funds in the purchase of real estates) and upon what terms; and in case the Master should be of opinion that it would be proper for the petitioner to purchase the said estate, then that he might inquire and state whether it would be for the benefit of the said parties that an Act of Parliament should be applied for to enable the petitioner to purchase the said estate out of the said accumulations.

Mr. Wingfield, in support of the petition, cited *Ashburton v. Ashburton*,† and submitted that a reference might be made; and that if the purchase was approved by the Master, an order of the Court would be sufficient to enable the trustee to purchase, without an Act of Parliament.

THE VICE-CHANCELLOR :

I have jurisdiction to make the order, without the Act of Parliament; for if the estate be conveyed with a declaration of trust, that the character of the personal estate should remain unchanged, that in substance would be the investment of the accumulations in real security. In the event of the estate being purchased, *it is proper to declare, generally, it shall be considered as personal estate, without saying until the infant should attain twenty-one, as at that period he might be a lunatic, and

[*102]

† 5 R. R. 201 (6 Ves. 6).

other inconveniences. At twenty-one he may, if he pleases, consider it as real estate.

WEBB
v.
LORD
SHAFTS-
BURY.

The order made was,—“That it be referred to Mr. Harvey, the Master, to whom these causes stand referred, to inquire whether it will be proper and for the benefit of all persons who may be entitled to the estates of the testator, Sir John Webb, in the county of Dorset, and town and county of the town of Poole, and to the accumulations thereof, that the estate of William Churchill, Esq. in the petition mentioned, should be purchased by the petitioner, and upon what terms. And in case the said Master shall be of opinion that it will be proper for the petitioner to purchase the said estate, then he is to inquire whether a good title can be made thereto: And the said Master is to state the same, with his opinion thereon, to the Court. And after the said Master shall have made his report, such further order shall be made as shall be just. And this Court doth declare, that in the event of the estate being purchased, the same is to be considered as personal estate.”

FOX v. WRIGHT.

(6 Maddock, 111—112.)

1821.
July 11.

Post obit bonds of W. a young man, put up to sale by him, without reserve, relieved against. LEACH, V.-C.

[111]

THIS was a bill to be relieved from certain *post obit* bonds. The circumstances of the case are mentioned in the following judgment:

THE VICE-CHANCELLOR:

The true effect of the case of *Shelly v. Nash* † is, that every purchaser at a sale by auction of a reversion is not necessarily bound to establish that he purchased at a full price. That he may purchase under circumstances which make it as equitable that he should have the benefit of his bargain, without such proof, as if he had bought not a reversion but an estate in possession. The question is, whether the present defendant

† 18 B. R. 223 (3 Madd. 232).

FOX
v.
WRIGHT.
[*112]

purchased this *post obit* bond under such circumstances. *The particulars of sale disclose, that the vendor was a young man, about to raise a sum of 40,000*l.* upon *post obit* bonds, payable at the death of his father, and that the sale of these bonds was to take place without reserve, that is without any bidding on his part. Those who attended this auction, necessarily, therefore, knew that the vendor was a young man in distress; that he was so much pressed for money, that he undertook, with those who thought fit to be bidders, that he would not have recourse to those precautions by which every provident seller at an auction protects himself against an inadequate price; and I have to ask myself, in the language of the case of *Shelly v. Nash*, whether it can be considered, that such a vendor is not, in some sense, in the power of those who deal with him. And whether a sale by auction, under such circumstances, affords fair evidence of the market price. At all events, the question in this cause is of too much importance to be decided incidentally, upon this motion; and I must continue this injunction till the hearing upon the terms of the plaintiff bringing into Court the auction price, together with interest at five per cent. from the time of payment.



1821.
Nov. 1, 3.
LEACH, V.-C.
[114]

CREAK v. CAPELL.†

(6 Maddock, 114—115.)

If a sum be reported due, and exceptions are taken to the report, the money will not generally, on motion, be ordered to be paid into Court.

THE Master reported a sum of money to be due from the defendant to the plaintiff.

The report was excepted to.

Mr. Roupell moved that the defendant might be ordered to pay into Court the money reported due; * * but he acknowledged he had not been able to find any case, where on a report excepted to, money had been ordered to be paid in. If, he observed, the Court thinks that the exception to the

† *London Syndicate v. Lord* (1878) 8 Ch. Div. 84, 88.

report prevents the payment of the money into Court, it may be right to direct the exceptions to be at the head of the paper of exceptions.

OBEAK
v.
CAPELL.

THE VICE-CHANCELLOR :

[115]

Where the debt is ascertained, though the Court can only order payment by decree, it will secure the money in Court upon interlocutory application. Thus the Court will direct the payment of a balance into the name of the Accountant-General, which the defendant admits upon his examination, or in his answer ; and in like manner a balance, reported to be due by the Master, after the report is confirmed ; but, pending exceptions to the Master's report, the balance is not considered to be ascertained. Where it is evident that an exception is taken merely for delay, the party may make an application to the Court for the immediate hearing of the exception.

Motion refused.

MEREST v. JAMES.

(6 Maddock, 118—119.)

1821.
Nov. 5.

An equitable estate tail in a copyhold does not merge by the accession of the legal fee. LEACH, V.-C.

[118]

A QUESTION arose, on a petition in this cause, whether, when one has an equitable estate tail in a copyhold, with a remainder expectant on such estate tail, and the legal fee descends to him, the equitable estate tail is merged in the latter, and the expectant remainder defeated ?

Mr. Benyon contended that the equitable estate tail was merged in the legal fee, and cited *Challoner v. Murhall*† [and other cases].

Mr. Shadwell, and *Mr. Sugden*, *contra*.

The VICE-CHANCELLOR held, that in order to operate a merger, the equitable or legal estate must be of the same quality, and that an estate tail or a fee simple were not of the same quality.

[119]

† 3 B. R. 1 (2 Ves. Jr. 524).

1821.

Dec. 6, 7.

PRENDERGAST AND ANOTHER *v.* DEVEY AND OTHERS.

(6 Maddock, 124—126.)

LEACH, V.-C.

[124]

Liability of sureties where they are not affected by an agreement by the creditor giving time to the principal debtor.

THIS was a bill by sureties, to restrain an action against them upon a surety bond, and to have the bond delivered up, upon the ground, that the creditors had given time to the principal debtors without the sureties' consent. Upon the cause coming on in Hilary Term last, it was suggested, that the merits would be tried at law, upon a demurrer to the plea of the defendants there (the plaintiffs in equity), who had, amongst other pleas in bar, pleaded the instrument alleged to be a discharge of their liability, and the cause stood over.

The demurrer at law being allowed, and the plea overruled by the Court of K. B., the cause was now put again in the paper.

The facts appearing in the pleadings, and by a further statement agreed upon between the parties at the request of the Court, were these :

In September, 1818, the plaintiffs, as sureties for two persons of the name of Prendergast, coal merchants, became bound to the defendants, who supplied the Prendergasts with coals wholesale, in a penalty, conditioned to be void if the plaintiffs should within one month after demand on them pay such balance or sum of money not exceeding 500*l.* as should become due to the defendants upon settlement of accounts between them and the Prendergasts.

In June, 1819, it being alleged a balance of 1,099*l.* was due from the Prendergasts to the defendants, the latter, without communicating with the plaintiffs, took *from the Prendergasts a warrant of attorney for the amount, with a stay of execution if they should discharge the debt by instalments of 100*l.* a month, and on default, execution was to issue for the whole.

The first instalment under the warrant of attorney having fallen due on the 21st of July, and not being paid, the defendants, on the 7th of August following, made a demand on the plaintiffs according to the terms of the bond, and in the succeed-

[*125]

ing Michaelmas Term brought the present action, which the bill sought to restrain.

PRENDER-
GAST
v.
DEVET.

Mr. Wilson, and *Mr. Roots*, for the plaintiffs, relied upon the known principle, that a creditor dealing with the debtor without the concurrence of the surety, released the latter, and cited *Rees v. Berrington*,† and *Boulton v. Stubbis*.‡

Mr. Hart, and *Mr. Rose*, for the defendants, not disputing the general principle, insisted that the merits of the case had been already fully gone into at law; but it being stated from notes of what passed at law, that the judgment of the Court there had proceeded in a great degree upon technical grounds, they then submitted, that as by the condition of the bond the plaintiffs were only to pay within a month after demand made on them, it must be understood, that until demand upon them the creditors might make such terms with the debtors as they thought proper, provided, when the demand was made, there was nothing to interfere with the sureties' recourse back to the principal debtors.

The VICE-CHANCELLOR expressed his opinion that the warrant of attorney certainly gave time, which might *have discharged the sureties if they had been affected by it; but that here the sureties' liability not arising till demand, and previous to the demand default having been actually made by the debtors, so that execution might have instantly issued for the whole debt, the agreement made by the warrant of attorney was at an end, and the defendants were no ways injured, as there was nothing to interfere with their immediate recourse to the principal debtors.

[*126]

The plaintiff's counsel then pressed upon the Court, that although the sureties were to have a month after demand to pay in, yet the substantial agreement was, that they were to guarantee the creditors from loss by the Prendergasts, and therefore the character of sureties, and of course the rights of sureties, belonged to them equally from the date of the bond, whether demand was made on them or not; or if otherwise, still, that as the time of

† 3 R. R. 3 (2 Ves. Jr. 540).

‡ 11 R. R. 141 (18 Ves. 20).

PRENDER-
GAST
v.
DEVEY.

making the demand was entirely in the option of the creditors, it was unjust they should be permitted, while withholding it, to deal with the debtors as they thought proper, until the sureties' recourse to the debtors might be defeated in effect, although not legally gone; but his Honour thought the terms of the engagement, though singular and improvident, bound him to the construction he had put upon it, and dismissed the bill. He did not, however, give costs, because the point, that at the time the demand was made on the sureties the agreement for time made in the warrant of attorney was at an end, had not been made, either in the answer, or raised by the defendants at law, which point he declared was the fact upon which his judgment entirely rested.

1821.
Nov. 14.

JONES v. BROMLEY.

(6 Maddock, 137—141.)

LEACH, V.-C.

[137]

A testator having devised his property in trust for his wife during widowhood, on condition that she should, neither directly nor indirectly, keep or have any concern or interest in a public or licensed victualling house, or any other kind of business: Held, that the keeping and taking care of a public house belonging to other persons, as their servant, and at regular wages, and in the profits or emoluments of which she had no interest, was not such a breach of the condition as to create a forfeiture.

[*138]

RANDALL JONES, by his will, dated the 2nd August, 1816, after giving to his wife, Martha Jones, one of the defendants, all his household goods and furniture, plate, linen, and china, for her own use, bequeathed unto the defendants, J. Bromley, J. Williams, and R. Pearce, (whom he made his executors,) their executors and administrators, all the residue of his estate and effects, (consisting of money in the funds, and other personal property,) in trust, after payment of his debts, to permit and suffer his wife, Martha Jones, to receive and take the interest, dividends, and profits, of his funded and other property, during her natural life, if she should so long continue a widow, *and should, during that time, neither directly nor indirectly keep, or have any concern or interest in a public or licensed victualling house, or any other kind of business; and after the decease of his wife, or intermarriage, or her entering into or keeping, or having any concern or interest what-

JONES
v.
BROMLEY.

soever, either directly or indirectly, in any public or victualling house, or other business, or any of those events, upon trust, to sell the trust property, and after payment of certain legacies, to divide the residue among all the testator's next of kin, except John Jones the younger, to whom he had given a legacy.

The testator died in May, 1818, leaving his widow, Martha Jones, him surviving.

The bill filed by the legatees, and next of kin of the testator, against his widow and executors, among other things, stated, that since the death of the testator, his widow, Martha Jones, had become or been concerned and interested in a public or licensed victualling house; and that from the month of September, 1818, after the testator's decease, until the month of June, 1819, had kept the public or licensed victualling house, called the "Roman Eagle," at Deptford, and insisted that thereupon the said trust property, after payment of the several legacies, became divisible between the plaintiffs, John Jones the elder, and Edward Jones, as the brothers and next of kin of the said testator. * * *

[139]

The defendant, Martha Jones, by her answer, stated, that the testator carried on the trade or business of a publican, at and for some time previous to his death; but such business was chiefly managed and conducted by her; and that having had such experience in carrying on the business of a publican, and being desirous of having employment, she, after the testator's death, and in the summer of 1818, applied to Messrs. Taylor & Co., brewers, who are the owners and proprietors of several public houses, and stated her desire to be employed as their servant, in keeping open and taking care of any public house belonging to them and remaining unoccupied, until they could procure a regular tenant. That in October, 1818, Messrs. Taylor & Co., in consequence of that application, sent to the defendant, and informed her that a public house belonging to them, called the "Roman Eagle," at Deptford, was then unoccupied; and offered to pay or allow her wages after the rate of one guinea a week, to take care of and keep the said public house for them, as their servant, until they could procure a regular tenant, which she agreed to do; and accordingly did, for the

JONES
 v.
 BROMLEY.
 [*140]

time mentioned in the bill, but merely and only as their servant, and at such wages as aforesaid ; and that she *was not paid or allowed, nor did she receive, directly or indirectly, any property, emolument, or income, whatsoever, for keeping open the said house, except the wages aforesaid ; and the said defendant denied, that since the death of the said testator she had been concerned or interested in any public or licensed victualling house ; and insisted, that under the circumstances she could not be considered as keeping the said public house, or carrying on the business of a licensed victualler.

On the 16th of June, 1820, it was ordered (by consent,) that it be referred to the Master, to inquire and state to the Court whether the defendant, Martha Jones, was then entitled to receive the income of the residuary estate of the testator, Randall Jones ; for the better discovery whereof the parties were to produce before the Master, upon oath, all books, papers, and writings, relative thereto, in their custody or power, and were to be examined upon interrogatories, as the Master should direct.†

The Master having made his report in favour of the defendant, Martha Jones, exceptions were taken to it.

Mr. Teed, for the plaintiffs.

Mr. Lovat, for the defendant, Martha Jones.

Mr. Andrews, for the other defendants.

THE VICE-CHANCELLOR :

[*141] In order to work a forfeiture, the act complained of must be not only within the letter but within the spirit *and intention of the prohibition. In a sense this person kept a public house, but the keeping which this testator must have contemplated was a keeping on her own account, which would have exposed to the hazards of business the provision which he had made for her maintenance. She did ostensibly, but not substantially, keep this public house. In a sense she had a concern or interest in this public house, but the concern or interest which this testator

† Reg. Lib. A. 1819, fol. 1658.

must have contemplated, was a concern or interest which would have led to the same consequences to his property as if she had been substantially the keeper of the house—a concern or interest as a partner. My opinion therefore is that the widow is still entitled to her life-interest in the testator's residuary property, and that the

JONES
v.
BROMLEY.

Exception must be overruled.

PETTYT v. JANESON.†

(6 Maddock, 146—148.)

1819.
July 16.

Partnership articles direct a yearly settlement on 25th March, and if a partner die his estate is to share in no profits subsequent to the last yearly settlement. The last settlement is on the 5th November, 1811, and a partner dies in February, 1813. His estate shares in profits up to the 5th November, 1812.

LEACH, V.-C.

[146]

UPON a partnership formed between the plaintiff's testator and the defendant, it was agreed by covenant in writing, that the partnership account should be stated and settled upon every 25th March. And it was further agreed, that if either of the partners should die during the continuance of the partnership, which was for a term of years, that his interest in the concern should be regulated by the last yearly settlement; and that he should have no concern with profit or loss from that time; but his executors should from that time receive interest at five per cent. on the sum due to *him at the last yearly settlement. The plaintiff's testator died on the 18th February, 1813, before the expiration of the partnership term. The partnership accounts were for several years duly settled on the 25th March in each year; but for many years before the testator's death that practice had been discontinued, and the settlements were made at uncertain periods, and sometimes after an interval of sixteen or eighteen months.

[*147]

In one instance a settlement was made a few days before the expiration of a year from the preceding settlement.

The last settlement before the death of the testator was made on the 5th November, 1811.

† *Hunter v. Dowling*, '93, 3 Ch. 212, 62 L. J. Ch. 617, 2 R. 608, C.A.

PETTYT
v.
JANESON.

The defendant had begun to take steps with a view to a further settlement in October, 1812, but the plaintiff's testator then refused to come to a settlement.

The question in the cause was up to what time the testator's estate was to share in the profits of the trade.

The plaintiffs insisted that they were to share in the profits up to his death, there being no annual settlement according to the articles.

The defendant insisted that the account of profits was to cease with the last actual settlement on the 5th November, 1811.

July 16.

[148]

The VICE-CHANCELLOR observed, that the articles had two plain intentions: That there should be an annual settlement; and that the estate of a deceased partner should receive no profits for the fraction of the year since the last annual settlement: That the settlement of the 5th November, 1811, was to be considered as a settlement substituted by the agreement of the parties in the place of the settlement stipulated for in the articles: That if the testator had died on the 1st October, 1812, it could not have been contended that his estate was to take profits subsequent to the 5th November, 1811, being the last settlement within a year of the death; and if this were to be treated in that case as a settlement within the spirit of the articles against the testator's estate, it must be equally considered as a settlement for the testator's estate, as a settlement on the 5th November, 1811, which bound each party to come to the next annual settlement on the 5th November, 1812. That the Court must act upon that which ought to have been done as if it had been done, and must declare the testator's estate entitled to a share in the profits up to the 5th November, 1812, being the day which ought to have been the last annual settlement before the testator's death.†

† Reg. Lib. B. 1818, fol. 2011, 2013.

LUSHINGTON v. BOLDERO.†

(6 Maddock, 149—150.)

1819.
July 26.

LEACH, V.-C.

Timber left standing for ornament or shelter ought not to be cut, though decayed or injurious to adjoining trees, unless its removal is essential to intended purposes of ornament or shelter. [149]

THE Court had in this case referred it to the Master to inquire whether timber cut by the defendants had been planted or left standing for ornament or shelter;‡ and whether such timber was decayed, or injured the growth of adjoining trees. Exceptions to the Master's report being overruled,

THE VICE-CHANCELLOR observed, that the principle of the Court was, that where an estate for life unimpeachable of waste was given, with a remainder over, the intention of the testator was presumed to be, to preserve entire the succession of the estate, but to give to the tenant for life the full profit that could be derived from a fair course of enjoyment.

That the destruction of timber which the testator had either planted or preserved for ornament or shelter was inconsistent with the fair enjoyment which he intended, and with the preservation of the succession. That the fact of planting for ornament was capable of being easily ascertained; but the fact of preserving for ornament was less obvious, and was to be collected from circumstances of the conduct in the testator. That the leaving trees standing beyond the usual and provident period of cutting, the clearing out of trees, and surrounding them by pleasure-walks and seats, and other circumstances from which an inference arose *that the testator regarded the trees with other views than as mere subjects of profit, were to be considered as *prima facie* evidence, that trees were left standing for ornament and shelter, and more especially when actually connected with those objects from their situation. [*150]

That the Court could not act upon the subsequent inquiry when the trees were decayed, or injured the adjoining timber, because trees most essential for ornament or shelter, and best

† *Baker v. Sebright* (1879) 13 Ch. D. 179, 184; 49 L. J. Ch. 65.

‡ 5 Aug. 1815. Reg. Lab. B. 1819, fol. 765.

LUSHINGTON ^{v.} entitled to the protection of the Court, might be decayed, and
BOLDERO. might injure the trees adjoining.

His Honour referred it to the Master to inquire whether any and which of the timber and other trees so cut and sold, injured or impeded the growth of any other trees adjoining thereto, which were of so much importance to the purposes of ornament or shelter intended by the devisor, that the removal of the timber or other trees so cut and sold was essential to such purposes of ornament or shelter.†

1819.
July 26.

LIMBREY v. GURR.†

(6 Maddock, 151—153.)

LEACH, V.-C.
[151]

Grant of land void under 9 Geo. II. c. 36,§ where there is a resulting trust for the grantor during his life.

Where the principal charity fails the accessory fails with it.

A several charity may be good though connected with a charity that fails. Where a residue is given to a valid purpose, it will fail with the prior void purpose, if not capable of being ascertained except by the actual execution of that purpose.

THE testator being possessed of land on a lease for 991 years, did some time before his death, exceeding twelve calendar months, assign such lease to trustees upon trust, that they would within one year after his death, at the expense of his estate, erect almshouses thereon, to be occupied and enjoyed in the manner therein stated. By his will he gave a sum of 7,000*l.* stock upon trust, to pay his funeral expenses, and the expenses of his monument, and the building of eight houses on the land in question, and the residue to be applied to the trusts directed with respect to another sum of 8,000*l.* He then gave a further sum of 8,000*l.* stock to trustees, upon trust, to pay certain sums weekly out of the income, to certain poor persons, who appeared to be the same that were intended to reside in the almshouses; then to give a quartern loaf of bread to twenty other persons weekly; then to pay the ground-rent, taxes, and all repairs and charges of the almshouses: and the residue of the income to be applied upon

† Reg. Lib. B. 1819, fol. 765-767. L. R. 9 Ch. 651.

‡ *Dawson v. Small* (1874) L. R. § Repealed, and substantially re-enacted by 51 & 52 Vict. c. 42.
18 Eq. 114, 43 L. J. Ch. 406; *affd.*

the trusts after mentioned, with respect to a further sum of 7,000*l.* stock; then he gave a further sum of 7,000*l.* stock upon trust, to apply the income in the distribution of bread in the manner therein mentioned. He appointed the same persons governors of all these charities, calling them several charities; and these governors had the nomination of the objects of charity. He directed that a clerk should be appointed at a salary of 20*l.*, for conducting the business of all the charities, and should transact the business in a room *to be built with the almshouses, and called the committee room.

LIMBREY
v.
GURR.

[*152]

In a subsequent testamentary paper he made an estimate of the expenses of his funeral and monument, and the building of the almshouses, and calculated that a sum of 1,600*l.* would remain to be applied to the purposes of the 8,000*l.*; but at the same time he declared that the residue would be wholly uncertain, not only in respect of the uncertain price of stocks, but because he left, with respect to the prior expenses, an absolute discretion in his executors.

The VICE-CHANCELLOR held first, that the trust of the lease during the life of the testator not being declared in the deed of assignment of the lease resulted to the grantor, and, consequently, that the assignment was void by the 9 Geo. II. c. 36, s. 1, not being "To take effect in possession for the charitable use intended immediately from the making thereof."

2. That the gift of the 7,000*l.* was void, except as to the funeral expenses and the building of the monument, because the almshouses could not be built; and because the gift of the residue of the 7,000*l.*, notwithstanding the calculation of the testator in his subsequent testamentary paper, failed by reason of its uncertainty, inasmuch that by reason of the discretion left with the executors it was only capable of being ascertained by the actual execution of the prior purpose.

3. That the gift of the 8,000*l.* failed as far as it was to be applied for the benefit of persons residing in the almshouses, because there could be no such persons; *and also as to the residue, because that was incapable of being ascertained except by the actual execution of the prior purpose.

[*153]

LIMBREY
v.
GURR.

4. That the gift of the 7,000*l.* stock, and the gift of as much of the 8,000*l.* as was intended for the distribution of bread, did not fail, being several charities from the almshouses, and not inseparably connected with them, either by the circumstance that the Governors were the same persons, holding as they did by a distinct appointment, or by the direction that the business of all the charities should be transacted by one clerk, and in the committee room of the almshouses.

That these purposes of the same clerk, and the same committee room, were mere incidents collateral to the charity, and not essential to it.†

PARRY v. WARRINGTON.

(6 Maddock, 155—157.)

1820.

March 28.

LEACH, V.-C.

[155]

Where a testator directs a purchase with all convenient speed, and interest in the mean time to accumulate, and trustees neglect the purchase, twelve months is to be considered as a reasonable time within which the purchase might have been made.

THE testator by his will gave a legacy of 50,000*l.* to trustees, with a direction to invest it with all convenient speed in the purchase of land, which he limited to A. for life, with remainder over. And he directed, that until the purchase was made the dividends on the 50,000*l.*, which was in the *interim* to be laid out in stock, should accumulate.

By his codicil he directed all his legacies to be paid at the end of twelve months from his death.

The testator died the 6th April, 1816. The bill to carry the trusts of the will into execution was filed in February, 1818, and the answer of the trustees on the 12th March, 1818. They admitted the receipt of the *50,000*l.* at the end of the year from the testator's death, but did not allege that they had taken any measures for the purchase of land.

The question now upon further directions was, whether the whole interest which had accrued due from the end of the year after the testator's death, or rather the whole dividends, for it had been invested in stock, should be added to the principal fund

† Reg. Lib. B. 1818, fol. 2059-2063.

for purchase, or whether the tenant for life should take any part of such dividends?

PARRY
v.
WARRING-
TON.

The case of *Elwin v. Elwin* † was principally relied upon against the tenant for life.

The VICE-CHANCELLOR was of opinion, that inasmuch as the trustees had not proceeded to invest the legacy in the purchase of land with all convenient speed after the legacy was paid, the interests of the tenant for life ought not to be prejudiced by their omission of their duty. That the tenant for life was by the intention of the testator entitled to the income of this property as soon as with reasonable diligence the trustees could have invested it in land.

That the will had expressly provided, that until the trustees, using all convenient speed, could find a purchase, the income should accumulate, and this was not therefore a case in which a court of equity could consider the thing to be done at the moment when the trustees were enabled to do it. The testator had foreseen and provided for some interval which must arise if all convenient speed were used by the trustees. The trustees not having used convenient speed, the Court was now unavoidably compelled to adopt some time as the period within which, with all convenient speed, the purchase might have been effected. That it would be in vain to inquire into the circumstances of each particular case, in order to fix in that case what the period might have been; and some general rule must be adopted to apply to all such cases, as the Court had fixed twelve months for the time within which an executor, with reasonable diligence, might wind up the affairs of a testator.

[*157]

That it appeared to him, having regard to the time of the investigation of the title, twelve months was as suitable a period as any other for such a purpose; and he therefore directed that the tenant for life should receive the dividends from the end of the twelve months after the trustees had received the legacy, observing, that if in any such case the trustees were enabled to find a purchase sooner, it would be open to the tenant for life to contend, that his interest should commence from the

† 7 R. R. 117 (8 Ves. 547).

PARRY
v.
WARRING-
TON.

time of the conveyance. And that where trustees proceeding with all diligence did not complete a purchase within twelve months, it would be equally open to the adverse party to contend that the tenant for life should only take from the time of the conveyance.†

1820.
May 1.

PRICE v. STRANGE.

(6 Maddock, 159—165.)

LEACH, V.-C.
[159]

Legal representatives to be understood executors and administrators, unless controlled by intention upon the whole instrument.

WILLIAM HUMPHRIES by his will devised his real estate to trustees, upon trust, to pay the rents to his wife during her life, if she should so long continue his widow, and after her death, or second marriage, to sell the same. The will then proceeded thus :

“ And in case the death, or second marriage of my said wife shall not happen until the youngest of my children (whether he or she shall be living at my death, or born in due time afterwards) being a son, shall have attained his age of twenty-three years, or being a daughter, shall have attained that age, or be married with the consent and approbation of my said wife and trustees, or the survivor of them, then my will and meaning is, that my said trustees, and the survivors or survivor of them, shall immediately after the receipt of the money arising by sale of my said real estates, pay to and equally divide such money amongst such of my said children as shall be then living, and the legal representative or representatives of him her or them as shall be then dead, share and share-alike ; and in case such death or second marriage of my said wife shall happen *during the minority of any of my said children, then I will and desire my said trustees, or the survivors or survivor of them, to pay an equal share and proportion of the same money unto such of my said children as shall at that time be entitled to have or receive their, his, or her share or shares of my personal estate agreeable to this my will, in case he she or they shall be then living,

[*160]

† Followed by JESSEL, M.R., *Wing* and see *Sitwell v. Bernard*, 5 R. R. 374 v. *Wing* (1876) 34 L. T. N. S. 941, (6 Ves. 520).

PRICE
v.
STRANGE.

and if dead, then to his her or their legal representative or representatives, and to place out the share and proportion, or shares and proportions of such of my said children as shall not by reason of their age be so entitled, at interest, upon Government or some other good security, for the benefit of such last-mentioned children, and to pay or transfer the same to them, him, or her, at the same time that he she or they shall become entitled to payment or transfer of their his or her share or shares of my personal estate."

By the testator's will the shares of the personal estate were payable to the children at twenty-three, or in the case of daughters, upon their marriage, with such consent as aforesaid.

One of the sons became a bankrupt, and his share in the produce of the real estates expectant upon the death, or second marriage of his mother, who was still living, and a widow, was put up to sale by his assignees, and purchased by the defendant.

The bill was for a specific performance of this contract, and the defendant objected to the title upon the ground that the children did not take a vested interest during the life of their mother; and that if *a child died during the life of the mother, its share in the real estate went to persons designed as substitutes, by the term "legal representatives."

[*161]

Or at all events there was so much doubt in the question, that a purchaser ought not to be compelled to take the title.

The cases relied on were *Evans v. Charles*,† where, if A. died in the lifetime of the testatrix, the legacy was to be paid "to his personal representatives." And the Court of Exchequer held that his administrator took beneficially.

And *Bridge v. Abbott*,‡ where, if A. died in the lifetime of the testatrix the legacy was given "to his legal representatives;" and Lord ALVANLEY held that the next of kin were entitled.

THE VICE-CHANCELLOR:

It is difficult to yield assent to *Evans v. Charles*, that the personal representative took beneficially. It might have been better to have held that the personal representative was to take it

† 1 Anstr. 128. [Overruled, *Well-man v. Bowring* (1822) 1 Sim. & St. 471.]
‡ 3 Br. C. C. 224.
24; *Long v. Wilkinson* (1852) 17 Beav.

PRICE
v.
STRANGE.

[*162]

upon trust, to administer it as a part of the testator's estate. Perhaps the same conclusion would have been best also in *Bridge v. Abbott*; but that decision is less objectionable than *Evans v. Charles*; the next of kin, in a sense, legally represent a person as to his personal estate. In the Statute of Distributions, the term "legal representatives" means descendants, and not next of kin; as for example, *a son of an intestate is dead, leaving a widow and child.

The widow takes nothing, and the child the whole of its father's share; yet the widow, though not strictly one of the next kin, is in the same sense as the child a legal representative of the personal estate of the father. I do not collect whether Lord ALVANLEY in *Bridge v. Abbott*, adverted to the case of a widow, and would have included her in his sense of legal representatives.

Neither *Charles v. Evans*, nor *Bridge v. Abbott*, strictly apply to the principal case. In both, the question was, who was intended to be substituted by the testator in the event of the death of the legatee in his life; who was to take at the death of the testator. Here there is no doubt who is to take at the death of the testator; the children living at his death, or born in due time afterwards. But the question is, whether the interest of the undoubted legatees vests at the death of the testator, or upon attaining twenty-three, or marriage, if a daughter, with consent; or upon the second marriage, or death of the widow.

The defendant's objection is, that the interest of the bankrupt, who has attained twenty-three, is still in contingency until the second marriage, or death, of his mother.

[*163]

In *Evans v. Charles*, and *Bridge v. Abbott*, the word "representatives" clearly meant substitutes; and the question was, who were the substitutes intended; but the single question here is, whether the word "representatives" *is a term of substitution or of limitation, expressing the quantity of interest intended for the legatee.

It is a sound rule of construction to understand words in their ordinary sense, unless controlled by a different intention appearing upon the whole instrument. The ordinary sense of legal representatives is executors or administrators; and reading the words in that sense, in the first passage, makes it equivalent to a

PRICE
v.
STRANGE.

direction to pay the produce of the estate at the death of the widow to the children, their executors or administrators; or, in other words, gives a vested interest to the children; and the question is, whether this ordinary sense is controlled by a different intention appearing upon the whole instrument.

This first passage applies to the case of all the children having attained twenty-three, or being daughters, having married with consent, in which case an immediate division of the whole property is to take place.

The next passage supposes the case of children who have not attained twenty-three, or being daughters, have not married with consent; and it provides that the shares of the children who are entitled to or have received their proportions of the personal estate, by which is meant those who have attained twenty-three, or being daughters, have married with consent, shall be paid to them if then living; and if dead, then to his, her, or their legal representative or representatives.

This raises a question whether the representatives of any deceased child are to take, unless such child had *attained twenty-three, or being a daughter, had married with consent; but it is not necessary to discuss that question in this case, for the bankrupt has attained twenty-three. To his legal representatives his proportion is payable; and understanding the words in the sense of executors and administrators, then, as in the first passage, it is during the life of his mother, a vested interest in him.

[*164]

Then follows a direction to place out the shares of children, who by reason of their age are not entitled to receive them; and it is to be observed, that this direction is in terms which give a present vested interest to such children not depending in contingency, until they attain twenty-three; or being daughters, are married with consent. Upon the whole, therefore, using the words "legal representatives" in their ordinary sense, a vested interest is given to these children, at least on their attaining twenty-three; or being daughters, on their marriage with consent; and I find nothing in the will to control this sense, and this intention to give a vested interest to children attaining twenty-three, or being married with consent, is much more consistent with common prudence than an intention which would

PRICE
v.
STRANGE.

leave the children, whatever their ages might be, or the wants of their families, or the necessities of their situation, wholly without certain provision during the life of their mother.

[*165]

The strong inclination of my opinion therefore is, that the plaintiffs, the assignees of the bankrupt, can make a good title to his share. But having regard to the proposition, that a purchaser is not bound to take a doubtful title, without undertaking to determine precisely *the limit and extent of that rule, I am of opinion that this case is, within the sense of that proposition, a doubtful title.

In attempting to lay down a rule upon this subject, I should say that a purchaser is not to take a property which he can only acquire in possession by litigation and judicial decision ; and

That the trustees here could never be advised, after the case of *Bridge v. Abbott*, to divide the property in question without the direction of a Court ; and to compel the purchaser therefore to take this title would be to compel him to buy a law suit.†

1819
Nov. 27.

HODLE v. HEALEY.‡

(6 Maddock, 181—185.)

LEACH, V.-C.

[181]

Acknowledgment of mortgage title by a letter referring to a previous agreement under which the mortgagee claimed to be entitled to a release of the equity of redemption.

IN 1777, the defendant Healey contracted to purchase from those who then represented the interest of the plaintiff the premises in question, which were subject to two mortgages, and afterwards, but before 1782, he paid off these mortgages, and took assignments to himself.

[*182]

In 1782 the vendors filed a bill against him for a specific performance of his contract, and in his answer he insisted that the vendors could not make a good title. On the 22nd January, 1784, an agreement was entered into between the vendors and the defendant, whereby the vendors agreed to dismiss their bill, and the defendant engaged not to proceed against them *personally

† Reg. Lib. B. 1819, fol. 920.

(1870) 10 Eq. 275, 278 (affd. L. R.

‡ Followed with some doubt by 6 Ch. 478).

MALINS, V.-C., *Richardson v. Youngs*

for the costs of the suit; but it was stipulated, that if the vendors should prove to be the persons entitled to the equity of redemption, that the defendant should be allowed in his account of rents and profits the costs of such suit, and that the premises should not be redeemable without the payment of such costs, as well as of the money due on the mortgages.

HODLE
v.
HEALEY.

In the year 1786, there being then about 800*l.* due to the defendant, the premises were put up to sale, and there being bid for them only the sum of 640*l.* no sale was had.

By indentures of lease and release, bearing date the 21st and 22nd of September, 1787, Sarah Smith, one of the vendors, claiming to be entitled to a moiety of the premises, conveyed or released her equity of redemption to the defendant; and in the release the agreement of January, 1784, was recited, and the subsequent attempt at sale, when the 640*l.* was bid; and the release proceeded upon the ground that the money due to the defendant exceeded the value of the property.

Elizabeth Hodle, the sister of Sarah Smith, who claimed to be entitled to the other moiety of the equity of redemption, and was a party to the agreement of January, 1784, was at this time dead, leaving an infant daughter, one of the plaintiffs, to whom her title, if any, had then descended.

In the month of June, 1804, the plaintiff, Hodle, who had been the husband of Elizabeth Hodle, and was father of the plaintiff, the daughter, and who claimed an interest as tenant by the curtesy, wrote to the *defendant, requesting that he would come to an account for the rents and profits of the mortgaged premises, and the defendant answered such letter in the following words :

[*183]

“MR. GEORGE HODLE.

SIR,—Mr. Harrox says, the 12th instant you called on him, and said you did not know of any promise or agreement you had made for your daughter to sign. I always understood it was requested, from the agreement made by you, your wife Elizabeth, Sarah Smith, and myself, the 22nd January, 1784, where you agree to withdraw all proceedings in the suit in Chancery, and ordered me to dismiss such suit. If your daughter's husband, or his father, wants to know particulars more than you can tell them, if

HODLE
v.
HEALEY.

they will favour me with a line, I will send them, or if there is any one in York they would like to see the agreement I have no objection. When I last saw you, your wife and daughter, I thought we had fixed what was to be done after she was of age; but if her father has any one here more likely to serve her than me, I will advise with them, as it may be in my power to inform them how things really are here with them.

“ (Signed) GEORGE HEALEY.”

“ YORK, 15th June, 1804.”

The bill was for a redemption, which, as to a moiety, was excluded by the deeds of 1787, which were unimpeached by evidence; and as to the other moiety, the question was, whether the letter of 1804 prevented the defendant insisting upon the length of possession.

THE VICE-CHANCELLOR :

[*184] A court of equity acts with equitable rights by analogy to the Statute of Limitations in the cases of *ejectment, and holds that twenty years possession by a mortgagee, under certain circumstances, is equivalent to twenty years adverse possession at law. There is, however, this material difference between adverse possession at law and the possession of the mortgagee; adverse possession at law is inconsistent with the title of the true owner, but the possession of the mortgagee is consistent with the equitable title of the mortgagor: twenty years adverse possession gives therefore absolute title to the possession at law, but twenty years possession of the mortgagee does not in itself give title against the mortgagor. If for twenty years the mortgagor has suffered the mortgagee to hold as if he were the true owner, without acknowledgment of the mortgage title, and if for twenty years the mortgagee has considered himself as the true owner, and kept no accounts as mortgagee, a court of equity holds that this negligence of the mortgagor shall protect the mortgagee from the difficulty which, in such circumstances, would attend the mortgage account: but if within the twenty years the mortgagee has acknowledged the mortgage title, a court of equity imputes no negligence to the mortgagor; or if within the twenty years the mortgagee has kept accounts, or otherwise dealt with

the property as mortgagee, a court of equity sees no such hardship in the case of the mortgagee as ought to protect him from the account in respect of the mortgagor's negligence. The single question here is, whether the letter of the 15th June, 1804, being within twenty years of the filing of the bill, is an acknowledgment of the mortgage title. It is to be observed that the defendant had expressly acknowledged the mortgage title by the deeds of 1787, and that at the time of writing this letter the defendant *had no ground upon which he could allege, in answer to the application made to him for the account, that the equity of redemption was barred; and he does not so allege. The case he makes is an express admission that the equity of redemption, as to the moiety of the mother, still remained in the daughter; and he claims to have this equity of redemption released by the daughter, in consequence of some promise made to him by the father and the mother. He has made nothing of this alleged promise from the father and the mother; and as the case now stands upon the length of time, this letter is a clear acknowledgment of the mortgage title.

HODLE
v.
HEALEY.

[*185]

I fully admit the doctrine in the cases cited,† that such acknowledgment is not to be inferred from equivocal expressions; but it may be observed, that the force of the expressions used may in some degree depend upon the time when they are used. In all the cases referred to, the twenty years had actually passed before the expressions were used; and the question was, whether their effect was to revive a right then lost to the mortgagor. The question is very different when the inquiry is, whether what passes is not an admission of a right which, at the time, was clearly vested in the mortgagor.

† *Whiting v. White*, Coop. 1; *Reeks v. Postlethwaite*, ib. 162; and *Barron v. Martin*, ib. 189. [See now 3 & 4 Wm. IV. c. 27, s. 28, modified by 37 & 38 Vict. c. 57, s. 7: the cases referred to are considered to be no longer of any practical utility and therefore have not been reproduced in the Revised Reports. —F. P.]

1821.
Jan. 26.

LEACH, V.-C.
[199]

BECKETT v. MICKLETHWAITE.

(6 Maddock, 199—204.)

[THIS was a suit for the foreclosure of two estates mortgaged to the plaintiff and H. Duncombe, since deceased, by a principal debtor (represented by the defendant Micklethwaite), and by a surety (represented by the defendants Lupton and Brook).]

[202] *Mr. Hart, and Mr. Barber, for the plaintiff.*

Mr. Bell, and Mr. Meggison, for the defendants.

THE VICE-CHANCELLOR :

I had lately occasion to consider the proper form of decree in a case of this kind, and the Registrar will follow the precedent then settled.

The decree was as follows :

[*203] “ This Court doth order and decree, that it be referred to Mr. Stephen, one, &c. to take an account of what remains due to the plaintiffs for principal and interest in respect of his mortgage of 2,500*l.* in the pleadings mentioned, secured by the several indentures therein set forth, bearing date respectively the 29th and 30th days of May, 1793, and the same 29th and 30th *days of May, and the bond from the defendant Thomas Micklethwaite, in the pleadings mentioned, bearing date the 16th October, 1814, and to tax the costs of the plaintiff in this Court and at law. And it is ordered, that the said Master do take an account of the rents and profits of the mortgaged premises comprised in the indenture first stated in the plaintiff's bill, dated the 30th day of May, 1793, received by the plaintiff and the said H. Duncombe, deceased, or either of them, or by any other person or persons by their or either of their order, or for their or either of their use, or which without their or either of their wilful default might have been received thereout. And it is ordered, that what on taking the said accounts shall appear to have been received for the rents and profits of the said mortgaged premises be deducted from what

BECKETT
v.
MICKLE-
THWAITE.

the said Master shall find due to the plaintiff for principal, interest, and costs as aforesaid ; and upon the defendant, Thomas Micklethwaite, or the defendants, Jonathan Lupton and Obadiah Brook, paying unto the plaintiff what shall be remaining due to him for principal, interest, and costs as aforesaid, within six calendar months after the said Master shall have made his report, at such time and place as the said Master shall appoint, it is ordered, that the plaintiff do convey the mortgaged premises in the manner following, viz. : In case the said defendant, Thomas Micklethwaite, shall redeem the plaintiff as aforesaid, that the plaintiff do convey the mortgaged premises comprised in the indenture first stated in the plaintiff's bill, bearing date the 30th day of May, 1793, free and clear of and from all incumbrances done by him, or any claiming by from or under him, and deliver up all deeds and writings in his custody or power relating to the said mortgaged *premises, upon oath, to the defendant Thomas Micklethwaite, or as he shall appoint. And it is ordered, that the defendant do also convey the mortgaged premises comprised in the indenture secondly stated in the plaintiff's bill, bearing date the same 30th day of May, 1793, free and clear, &c. and deliver up all deeds and writings in his custody or power relating thereto upon oath to the said defendants, Jonathan Lupton and Obadiah Brook, or as they shall appoint. But in case the said defendants, Jonathan Lupton and Obadiah Brook, shall redeem the plaintiff as aforesaid, then it is ordered, that the plaintiff do convey the mortgaged premises comprised in each of the said several indentures of the 30th day of May, 1793, free and clear, &c. and deliver up all deeds and writings in his custody or power relating thereto, to the defendants, Jonathan Lupton and Obadiah Brook, or as they shall appoint. But in default of the defendant Thomas Micklethwaite, or the defendants Jonathan Lupton and Obadiah Brook, paying unto the plaintiff what shall be remaining due to him for principal, interest, and costs as aforesaid, by the time aforesaid, the said defendants are from thenceforth to stand absolutely debarred and foreclosed of and from all right, title, interest, and equity of redemption, of in and to all the aforesaid mortgaged premises ; and for better

[*204]

BECKETT
v.
MICKLE-
THWAITE.

taking the said accounts all parties, &c. [usual directions] and any of the parties are to be at liberty to apply to this Court as there shall be occasion."†

1821.
June 2.

POWELL v. MOUCHETT.‡

(6 Maddock, 216—218.)

LEACH, V.-C.
[216]

Equity cannot correct wills upon the head of mistake, but follows the rule of law, that a deviser is to be taken to mean what he has expressed; but the Court may direct an issue, to inquire whether a particular expression found in the will forms part thereof.

In this case a deviser, after a will made, dated the 3rd September, 1807, executed a second testamentary instrument, dated the 18th May, 1813, for a partial purpose, but with an express clause of revocation. It was alleged that he was incompetent at the time of the second instrument, or if not incompetent, that the clause of revocation was introduced without any such intention on his part.

The question was, how the issue or issues should be framed to try both these points?

The VICE-CHANCELLOR observed, that in the case of a deed drawn by the mistake of an attorney against the intention of the parties there was contract and consideration, but that a devisee was a volunteer for whom a court of equity would not interfere.

That at law, evidence was not admissible that the deviser did not mean that which he had expressed, and the rule must be the same in equity. But evidence was admissible, to shew that a particular expression was not his will, as in the obvious case of interpolation after the execution of the instrument.

That it appeared to him there must be two issues.

1st. *Devisavit vel non*, as to the whole of the second instrument.

[217] 2nd. *Devisavit vel non*, as to the clause of revocation.

It appears from the Registrar's book that an issue was tried in the above causes before the Lord Chief Justice of the Court of Common Pleas, when on the first count of the said issue the jury

† Reg. Lib. A. 1820, fol. 871. ‡ See 21 R. R. 310 (5 Madd. 364).

found that the testator William Lichfield did not devise in manner and form set forth in the paper writing of the 18th May, 1813. On the second count, that the said testator at the time of the making and signing of the said paper writing was not of sound mind. On the third count, that the said paper writing was executed according to the directions contained in the Statute of Frauds. And on the fourth count, that the whole and every part of the said paper writing was not the true last will and testament of the said William Lichfield; and, at the same time, delivered in a paper writing in the following words, "The former will good; and the last will can only be considered as a codicil, thereby leaving out the revocation clause." It being thought that the above findings were inconsistent, and that the true question to be tried was not sufficiently put in issue, the causes came on for re-hearing on the 2nd June, 1820, when it was ordered that the parties should proceed to a trial at law upon the following issues: First, whether William Lichfield did, in and by a certain paper writing, bearing date the 18th May, 1813, devise in manner following, that is to say, "I give, devise and bequeath, unto Abraham John Mouchett, his heirs, executors and administrators, so much of my real and personal estate as will be sufficient to raise and pay to my brother John Lichfield, the sum of 100*l.* a-year, and which sum I direct the said A. B. Mouchett to pay to him by quarterly *payments, &c.; and I give and bequeath to the said A. B. Mouchett 200*l.* for his trouble in the execution of my will, and I constitute and appoint him my executor." Secondly, whether the words following, that is to say, "And I hereby revoke and make void all other wills," which are contained in the said paper writing, the 18th May, 1813, are part of the last will and testament of the said William Lichfield; and in case upon the trial any special circumstances should arise, the same were to be indorsed upon the *postea*.†

POWELL
v.
MOUCHETT.

[*218]

† Reg. Lib. B. 1820, fol. 1553.

K. B. MICHAELMAS TERM.

1819.
Nov. 6
[1]

BROUGHTON AND OTHERS *v.* THE COMPANY AND
PROPRIETORS OF THE MANCHESTER AND
SALFORD WATER-WORKS.

(3 Barn. & Ald. 1—12.)

[In an action upon a bill of exchange against this corporation, judgment was given for the defendants on the ground that the issue of the bill in question was an infringement of the statutory privileges then held by the Bank of England. The question had been also discussed whether the corporation, not being a trading corporation, could bind itself as a party to a bill of exchange; and upon this point the following observations in the judgment have been referred to in later cases.†]

[8] BAYLEY, J. :

The Act of Parliament, by which this corporation is established, does not contain any express power by which they are enabled to become parties to bills of exchange or promissory notes, nor is there any thing in the purpose for which this corporation was established, from which it is to be implied, that such a power was meant to be given. It seems to me, that the drawing of bills of exchange was quite foreign to the purpose for which this corporate body was established, which was for the erecting and carrying on water-works in a particular place. There being no power expressly given to them to make promissory notes, or to become parties to bills of exchange, I should doubt very much, (even if the Bank Acts were entirely out of the question,) whether such a corporation would have any power so to bind themselves for purposes foreign to those for which they were originally established. But without determining that point, this case

† *Bateman v. Mid-Wales Railway Co.* (1866) L. R. 1 C. P. 499, 509; 35 L. J. C. P. 205, 209; *South of Ireland Colliery Co. v. Waddle* (1868) L. R. 3 C. P. 463, 470; 37 L. J. C. P. 211, 215 (affd. in *Ex. Ch.* L. R. 4 C. P. 617). And see Pollock on Contracts, 6th ed. 125.—R. C.

seems to me to be clearly within the prohibition of the several Acts passed for the protection of the Bank of England. * * *

BROUGHTON
v.
THE
MANCHESTER
WATER-
WORKS CO.

BEST, J. :

I am of opinion, that the objection ought to prevail on both grounds. This comes within the statutes for the protection of the monopoly of the Bank of England: * * I am also of opinion, on the other ground, that this action is not maintainable, because this case comes within that rule of law by which corporations are prevented from binding themselves, by contract not under seal. When a company like the Bank of England, or East India Company, are incorporated for the purposes of trade, it seems to result from the very object of their being so incorporated, that they should have power to accept bills or issue promissory notes: it would be impossible for either of these companies to go on without accepting bills. In the case of *Slark v. The Highgate Archway Company*,† the Court of Common Pleas seemed to think, that unless express authority was given by the Act establishing the Company, to make promissory notes *eo nomine*, a corporation could not bind itself except by deed. Now there is nothing in the Act of Parliament establishing this Company which authorizes them to bind themselves except by deed. The Company, too, was not created for the purposes of trade, but merely to carry on the business of supplying the inhabitants of a particular place with water. Now it cannot be necessary, for this purpose, that they should become the makers of promissory notes or the acceptors of bills of exchange. As, therefore, the nature of the business in which they are engaged does not raise a necessary implication, that they should have the power to accept bills; and as no authority is expressly given by the Act of Parliament for that purpose, I am of opinion, on this latter ground also, that this action cannot be maintained.

[11]

[12]

Judgment for defendants.

† 5 Taunt. 792.

1819.
Nov. 6.

[13]

VAN SANDAU v. CORSBIE AND ANOTHER.

(3 Barn. & Ald. 13—21.).

By the 49 Geo. III. c. 121, s. 8,† the certificate of a bankrupt is a bar, not only to any action at the suit of the surety for the recovery of money paid in discharge of the original debt, but to any action for the consequential damage accruing from the non-payment by the bankrupt of the original debt, when due; and therefore, where the acceptor of an accommodation bill brought an action against the drawer, who had become bankrupt, for not providing him with funds to pay the bill when due, whereby he had incurred the costs of an action, and was obliged to sell an estate, in order to raise money to pay the bill, the certificate was held to be a good bar.

DECLARATION stated, that in consideration that plaintiff, for the accommodation, and at the request of defendants, would accept a certain bill of exchange, drawn by the defendants on plaintiff, by which defendants required plaintiff, four months after the date thereof, to pay to the order of defendants 1,021*l.* 5*s.* 6*d.* and would deliver the same so accepted to defendants, in order that defendants might negotiate the same for their own use and benefit, defendants undertook to provide him money for the payment of the said bill of exchange, when the same should become due and payable. It then stated, that plaintiff did accept the bill, and deliver it so accepted to the defendants; and that although the bill was negotiated by defendants for their own use, and has long since become due and payable, yet that defendants did not provide the money, in consequence whereof plaintiff was sued by the holder of the bill, and was forced to pay 30*l.* for the costs of an action, and to give a cognovit for the amount of such bill; and that when the amount became due, he was obliged to sell his estate and interest in a wharf at Rotherhithe, for the purpose of procuring the means of paying the money due on the bill; by reason whereof, plaintiff hath not only been put to great expenses of monies, but hath suffered great anxiety of mind, and hath been greatly

† Although the terms of the Act of 1883, s. 37, are still more comprehensive, this decision as to the proof by a surety is still, perhaps, not unimportant. The case is referred to in

the judgment in the Exchequer Chamber of *Tetley v. Wanless* (1867) L. R. 2 Ex. 275, 281; 36 L. J. Ex. 153.—R. C.

injured in his circumstances and credit, and greatly damnified, by reason of his having been obliged to sell and dispose of his said wharf. VAN SANDAU
v.
CORBIE.

Plea, after stating the trading of defendants, the petitioning creditor's debt, the issuing of a commission, under which they were declared bankrupts, their surrender on the 27th January, 1816, and the obtaining of their certificate on the 19th July following, which was duly allowed by the LORD CHANCELLOR, stated, that before the issuing of the commission, and before the defendants had committed any act of bankruptcy, the plaintiff had become liable for a debt of the defendants, upon the bill of exchange in the declaration mentioned, which had been drawn by the defendants and accepted by the plaintiff for their accommodation; and that such bill had been negotiated by the defendants, and at the time of the issuing of the commission remained in the hands of their creditors; and that before any dividend was made under the commission, the plaintiff being so liable after the issuing of the commission, paid the debt for which he was so liable to the holder of the bill; and that the creditor, who had not proved his debt under the commission, might receive under the commission a dividend in proportion to his debt, without disturbing any dividends already made. To this plea the plaintiff demurred, and assigned for cause, that it did not appear that the causes of action in the declaration mentioned were debts provable by the plaintiff, as a creditor of the defendant under his commission; and also that it did not appear, the causes of action being uncertain and unliquidated, that the damages could have been proved under the commission. The defendant joined in demurrer, and the Court of Common Pleas, after argument, gave judgment for the defendants.† A writ of error was then sued out, and the plaintiff in error assigned for error the same *causes as were assigned below on the demurrer. The case was argued before this Term, at the sittings at Serjeants' Inn, by [14]

F. Pollock, for the plaintiff in error. * * *

† Reported in 8 Taunt. 550, and briefly referred to in 20 B. R. p. 559.—
R. C. [*15]

VAN SANDAU
v.
CORSBIE.

Parke, contra [cited *Wood v. Dodgson* †].

[16]

ABBOTT, Ch. J. :

[17]

[*18]

That is quite decisive of this case. Here the principal ground and cause of action, supposing *the statute 49 Geo. III. had never passed, is the recovery of a sum of money paid by the plaintiff as acceptor upon the bill, and if an action had been brought, he might not only have recovered that money, but, perhaps, also the special damage which he had incurred, in order to raise money to pay the bill. That damage, however, could only have been recovered as an accessory to the principal debt; this is a novel attempt to separate the accessory from the principal; and it seems to me, that in point of law, that cannot be done. If we were to give effect to this action, we should, in a great measure, defeat the object of this very beneficial statute, which was intended to relieve the bankrupt from all claims of the surety, arising out of the original debt.

BAYLEY, J. :

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I am of the same opinion. If the statute of the 49 Geo. III. had never passed, if the plaintiff had been arrested upon the bill, and in order to pay it he had sold his estate at a loss, he could not then have brought two separate actions, first for the money which he had paid, and secondly, for the special damage which he had sustained by the sale of the estate. The plaintiff here is a surety; now the 49 Geo. III. enables the surety to prove his demand in respect of such payment, as a debt under the commission; and then it enacts, that the bankrupt shall be discharged of all demands at the suit of the surety, in regard to his debt, in respect of such suretyship; now it seems to me, that under this clause of the Act, the certificate is a bar not only to any claim for the money which constituted the original debt, but a bar also to any demand for accessory injuries arising out of the debt, and which accessory injuries could only be the subject of the same *action brought by the plaintiff to recover the money. In my judgment, the statute makes the certificate not only a bar

[*19]

† 14 R. R. 628 (2 M. & S. 195; 1 Rose, 47).

to the principal debt, but also to any consequential damage arising from that debt not having been duly paid. If this were not the proper construction of the statute, I cannot see why any creditor of a bankrupt subsequently to the 5 Geo. II., who had incurred special damage, in consequence of having been arrested, or of having been bound to pay costs, should not have brought an action for such consequential injury: but no such action was ever heard of; and with respect to costs it has been decided, that they are in the nature of an accessory, and that when the right to the principal is barred, the right to the accessory is barred also.† If that be so, there does not seem to be any distinction in principle between an arrest which is a restraint on the person, and the payment of costs, which is a restraint on the purse. I think that this declaration attempts to sever that which is not severable in point of law, and I think, therefore, that the judgment of the Court of Common Pleas ought to be affirmed.

VAN SANDAU
v.
CORSBIE.

HOLROYD, J. :

I am of the same opinion. Where the right to the principal debt is barred by statute, the right to damages, which are accessory to and consequential on that principal debt, is also barred. The obligation entered into by the defendant, as stated in this declaration, was to provide the plaintiff with money to pay the bill when it became due, and if the defendant had not become bankrupt, the plaintiff might have brought his action to recover this money. The defendant having become bankrupt, the remedy is *changed by the 49 Geo. III. c. 121, s. 8. That statute deprives the plaintiff of his remedy by action, and authorizes him to prove his demand in respect of any payment made on account of the debt under the commission, and it protects the defendant from all demands at the suit of the plaintiff with regard to his debt. Now I am of opinion, that when the remedy at law is taken away for the non-payment of the money, it is also taken away as to any consequential damage arising from such non-payment. I therefore think, that this action is not maintainable, and that the judgment should be affirmed.

[*20]

† See *Philips v. Brown*, 6 T. R. 282; *Scott v. Ambrose*, 15 R. R. 504 (3 M. & S. 326).

VAN SANDAU BEST, J. :

CORSBIE.

I entirely concur in the opinion delivered by my Lord and my brothers. I think that the certificate operates as a release of the debt, and of all demands arising out of that debt, and it would be absurd, that when the debt itself is released, the consequential damage resulting from it should remain a charge upon the bankrupt; if we were so to hold, we should deprive the bankrupt of one of the great advantages intended to be conferred on him by the legislature. Where money is to be repaid at a specified time, the lender of the money may frequently be damnified much beyond the extent of the principal and interest, and the borrower may, consequently, be liable for special damage. Now if the certificate did not operate as a bar against such a demand, there would have been frequent instances of actions of this nature. No instance, however, has been mentioned, in which such an action has been brought, and that, of itself, affords the strongest argument against the present claim. Upon the whole, I am of opinion, that this action is not *maintainable, and that the judgment of the Court of Common Pleas should be affirmed.

[*21]

Judgment affirmed.

1819,
Nov. 6.

NETHERTON v. WARD.

(3 Barn. & Ald. 21—30.)

[21]

A tenement situate in the king's dock-yard, deriving a benefit from the public sewers, and occupied by an officer of government, who paid no rent, is liable to be rated to the sewers.

TRESPASS for taking plaintiff's goods: plea, not guilty. At the trial before Graham, B. at the Spring Assizes, 1818, for the county of Surrey, a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case:

The trespass complained of was the taking of the goods of the plaintiff by the defendant, as a distress for non-payment of a rate made by the commissioners of sewers, for the limits extending from East Moulsey in Surrey to Ravensborne in Kent, under whose authority the defendant acted. The plaintiff was assessed in the sum of 8*l.*, as upon a rental of 60*l.*, in respect of a

messuage or tenement in his Majesty's dock-yard in Deptford, in the county of Kent, of which messuage or tenement the plaintiff then was, and still is the occupier, solely by virtue of the office of clerk of the survey of the said dock-yard, where he resided, and still resides, with his family and servants, not paying any rent for the same; nor can he occupy it longer than during the time of his holding such office, from which he may be removed at his Majesty's pleasure, at any time. The whole of the yard is within the district of Church Marsh Sluice, and the sluice and district are within the jurisdiction of the above commissioners. The dock-yard is principally drained by sewers, which are made and maintained at the expense of the Crown; but the dock-yard in general, as well as the house of the plaintiff, derive a benefit from the public sewers, which are under the direction and management of the commissioners. The whole of the dock-yard, and the messuage or tenement in respect of which the rate was made, as well as all the buildings and offices in such dock-yard, are the property of his Majesty. No rent, profit, or emolument, or advantage whatsoever, is derived to his Majesty from the dock-yard, or any of the buildings or offices therein, other than the use which is made of the same for the public office. The plaintiff was assessed by the rate in question, according to the yearly value of the messuage or tenement; and the commissioners are authorized by certain local acts, viz. 49 Geo. III., 50 Geo. III. and the 58 Geo. III., to make a general and equal pound rate, upon all and every person or persons who did or should inhabit or occupy any house, building, tenement, or hereditament whatsoever, within the aforesaid district, according to the yearly value of each and every such house, building, tenement, or hereditament; and in pursuance of such authority they made the rate in question, if the plaintiff was by them assessable, in respect of the messuage or tenement. It was then stated, that proper steps had been taken, on the part of the commissioners, to authorize the distress on the defendant's goods; and also, that proper steps had been taken, on the part of the plaintiff, in order to the bringing of the present action. If the Court should be of opinion, that the plaintiff was not liable to be assessed to the rate, the verdict was to stand; if

NETHERTON
v.
WARD.

[*22] .

NETHERTON *v.* WARD. the Court should be of a contrary opinion, a nonsuit was to be entered.

[23] *Jervis*, for the plaintiff. * * *

[24] *Platt, contra.* * * *

ABBOTT, Ch. J. :

[*25] I am of opinion, that the plaintiff, as the occupier of the messuage in question, was liable to this rate. It seems to me, that the question entirely *depends on the construction of the two statutes which have been referred to in argument, viz. that of the 23 Hen. VIII. c. 5, as connected with and explained by the 3 & 4 Edw. VI. c. 8. Now, the statute of Hen. VIII. was made to remedy a great public inconvenience, and to introduce a great public benefit. It enables his Majesty to issue a commission in a certain form therein mentioned, by which, among other powers given to the commissioners, was one "to enquire where defaults or annoyances be, through whose default the hurts and damages have happened, and who hath or holdeth any lands or tenements, or common of pasture, or profit of fishing, or hath or may have any hurt, loss, or disadvantage, by any manner or means, in the said places, as well near to the said dangers, lets, and impediments, as inhabiting or dwelling thereabouts, by the said walls, &c. and other the said impediments and annoyances, and all those persons, and every of them, to tax, discharge, distrain, and punish, as well within the metes, limits, and bounds of old time accustomed, or elsewhere within the realm of England, after the quantity of their lands, tenements, and rents, by the number of acres and purchase, after the rate of every person's portion, tenure or profit." Now, it may be said, that if the Act contained nothing more, the lands of his Majesty appropriated to the public service would not be liable to this rate; but by the 7th section † it is enacted, "That the commissioners shall have power and authority to make laws, ordinances, and decrees;" then the 8th section provides, "That if any persons assessed to any lot or charge for any lands, &c. do not pay the said lot or charge, the commissioners may decree and ordain the said lands or tenements to any person or persons,

† Repealed in part, Stat. Law Rev. Act, 1863.

for any term or terms of life or fee *simple;" and then comes the 9th section, by which it is provided, "That the same laws, ordinances, and decrees, to be made and ordained by the commissioners, shall bind as well the lands, tenements, and hereditaments of the King, our sovereign lord, as all other persons and their heirs, for such their interest as they shall fortune to have, or may have, in any lands, tenements, or hereditaments, or other casual profit, advantage, or commodity, whatsoever they be, whereunto the said laws, ordinances, and decrees shall anywise extend." There is, therefore, in the 9th section an express enactment that the lands, tenements, and hereditaments of the King shall be subject to the laws, ordinances, and decrees to be made and ordained by these commissioners. It might, however, have been doubtful, under this clause, whether the commissioners could distrain on the lands of the King to enforce the payment of this rate; and to remove any doubt on this subject, and in furtherance of the objects of the statute of Hen. VIII., the statute 3 & 4 Edw. VI. was made, by which it was enacted, "That all scots, lots, and sums of money, hereafter to be rated and taxed by virtue of such commission of sewers, upon any the lands, &c. of our sovereign lord the King, for any manner or thing concerning the articles of the said commission of sewers, shall be levied by distress." Now, that undoubtedly is a general legislative direction, that a distress for these rates might be taken upon the lands of the King. It has been argued, however, that these words are restrained by those which follow; for the statute goes on to say, that all bills of acquittance signed by the collector or receiver shall be a sufficient discharge to the tenants, farmers, and occupiers of the same grounds so to be charged for the said sum wherewith their grounds shall *be so charged, as also a sufficient warrant to all receivers and other officers of our lord the King, for the allowance to such tenant, farmer, or occupier, for the same. I cannot say, according to any reasonable construction of the Act of Parliament, that this second part of the section is to be considered as restraining the effect of the first, so as to confine the power of distress to such lands only as were in the possession of the King's tenants: it seems to me, that it is wholly unrestrained by the second, which applies only

NETHERTON
C.
WARD.
[*26]

[*27]

NETHERTON v. WARD. to a particular class of persons. For these reasons, it seems to me that the plaintiff was liable to the rate, and therefore that the judgment of nonsuit must stand.

BAYLEY, J. :

I think it quite clear, that this property is within the words and spirit of the Act of Parliament; and it would be most unjust if it were not so. A great public expense is incurred, for the benefit of a whole district; and amongst the property in that district which is benefited is the dock-yard. In addition to this, the persons there residing are also benefited. Now the statute of Hen. VIII. imposes a charge upon all persons who may be benefited by the expense which is so incurred, and expressly enacts, that the King's property shall not be exempted, which otherwise it would have been, because the Crown is not bound by an Act of Parliament imposing a charge, unless expressly named. My Lord Chief Justice has commented on the provisions of the 3 & 4 Edw. VI., and I entirely concur in the explanation which he has given of that statute. It has been argued, that the property of the King is not to be liable, unless it be in the hands of a tenant yielding rent; but why should such a distinction be made, for the land of the King is equally benefited by the expense incurred, whether it be in the *hands of a tenant, or whether it is applied by the Crown to public purposes? If it is applied by the Crown to public purposes, then it is for their benefit, and the public ought to pay. Why should the occupiers of land within the particular district bear the whole expense, the benefit of which is divided between them and the rest of the public? It is beneficial to the public at large that this land should be occupied as it is; and it is necessary for the purpose of occupation, that sewers, drains, &c. should be made, to defray the expense of which these rates are imposed. As the whole public have a benefit from this occupation, all parts of the kingdom ought to contribute. If this exemption, however, was to be allowed, the expense will be defrayed, not by the public at large, but by the occupiers of lands living within the particular district. It seems to me, therefore, that it would be an injustice to the inhabitants of this district if the lands of the Crown applied to

[*28]

public purposes were exempt; and I therefore think, that to whatever purposes such lands are applied, they are equally liable to this expense, and therefore that the rate should be levied.

NETHERTON
WARD.

HOLROYD, J. :

I am also of opinion, that the rate which has been made is a legal and valid rate. By the statute of Hen. VIII. persons who hold any lands or premises, are bound by the decrees of the commissioners of sewers. By the statute 49 Geo. III. c. 183, s. 33, the rate is directed to be made upon every person who may or shall occupy or inhabit any land, house, or building. By section 34 the occupier, or person in possession, is liable to be assessed for this rate; and by section 36 the occupier is entitled to be reimbursed by the landlord. Now, the plaintiff here is the occupier of a *house, and, as such, is assessable under this Act of Parliament, unless he be exempted by reason of its being land of the King. It seems to me, however, to be clear, that by the 9th section of the statute Hen. VIII., explained as it is by the 3 & 4 Edw. VI. c. 8, s. 2, that the lands of the King are expressly made liable to this assessment; and I am therefore of opinion that this rate should be levied.

[*29]

BEST, J. :

I am decidedly of opinion, that the assessment, in the present case, was legal. The provisions of the statute Hen. VIII. are founded in justice. It is the object of that statute to tax all persons equally, and distribute fairly the public burdens. In this case, the dock-yard is drained by the money raised in the particular district; and yet it is contended, that the property embraced within the ambit of the dock-yard ought not to bear any of the burdens cast upon the district. That, however, would be most unjust; it would be taking a burden from the public and casting it upon particular individuals, in direct opposition to every principle of fair taxation. It has been found hard enough, in the case of poor-rates, that while other proprietors of lands are obliged to maintain the poor, the lands in the immediate occupation of the Crown contribute nothing towards it, although the

NETHERTON
v.
WARD.

[*30]

servants of the King who inhabit the palaces of the Crown, situate on the lands of the Crown, frequently bring burdens on the parish. It would be equally hard, in this case, that the property which derived advantage from the money raised in the particular district should not contribute to the burden. I can see no principle of justice on which it should be so exempted from its fair contribution. The statute of Hen. VIII., however, has expressly *enacted, that the lands of the Crown shall pay this charge; and as to the statute of Edw. VI., I think the fair construction of it is this: That if the Crown leases its lands, the more convenient mode of raising this tax shall be, not to apply in the first instance to the Crown, but to charge the tenant, and allow the tenant to deduct it from the rent; for that clause would not at all apply to the case in which the Crown had, for the public service, granted a lease at a nominal or pepper-corn rent. In that case, the person holding lands of the Crown, without payment of rent, must stand in the situation of the Crown, and must be taxed for the Crown. It has been argued, that great inconvenience would follow from the enforcing of the payment of this tax. I do not think that the remedy by distress is applicable to the case of the Crown, or that the stores of Government are liable to be taken by that means; but although the King cannot be distrained upon, his tenants may, and that is sufficient to satisfy the statute of Edw. VI. The Crown is not, by that statute, exempt from the payment of this rate, although it be difficult to say what remedy the commissioners might have, in such a case, against the King. It is, however, fitly supposed, from respect to the King and his justice, that there would be no necessity for applying for any such remedy. The moment it is stated that the King ought to pay a sum of money, it is presumed that he will pay it, and that it is not necessary to enforce that payment by distress. Upon the whole, I am of opinion that the plaintiff is liable to this tax, although paying no rent, as he stands in the place of the King, and ought to pay the rate; and therefore I am of opinion, that a nonsuit ought to be entered.

Judgment of nonsuit.

TOWNSON *v.* TICKELL AND ANOTHER.†

(3 Barn. & Ald. 31—40.)

1819.
Nov. 6.

[31]

A devisee in fee may by deed, without matter of record, disclaim the estate devised.

COVENANT by one of two devisees, of the reversion against the defendants, as lessees. The declaration stated that one Jacob Astley, being seised in fee of part, and possessed for long terms of years of other parts of the premises, by indenture, demised the same for certain terms therein mentioned, to the defendants; that J. Astley, by his will, devised the reversion of the demised premises unto the plaintiff, and one John Lock, and that he appointed his daughter, Harriet Anne Bush, his executrix, and Joseph Astley and the plaintiff and John Lock executors of his will. It then stated the death of Astley, and averred, that John Lock never would or did assent to the said will, nor to the appointment of him the said John Lock therein contained, to be one of the executors thereof, nor to any bequest or devise therein contained, nor in any manner prove or join in the proof of, or act as or become an executor, or take upon himself the execution thereof; but always from the time of the death of the said Jacob wholly omitted and refused so to do, and on the contrary thereof, afterwards, to wit, on the 18th day of May, 1818, at, &c. by his certain deed, sealed with his seal, duly renounced the execution thereof; and afterwards, on the 19th May, in the year last aforesaid, by his certain other deed, the date whereof is the same day and year last aforesaid, absolutely disclaimed and renounced all and singular the estate and estates, trusts, powers, and authorities by the said will *devised, limited, created, or declared; and the said Harriet Anne, Joseph, and the plaintiff, afterwards, on the 25th of June, in the year last aforesaid, duly proved the said will, and took upon themselves the burthen of the execution thereof; and the plaintiff, afterwards, on the day and year last aforesaid, assented to the said devise and bequest of the said residue of the said reversion to him the said plaintiff in the said

[*32]

† Cited in the judgment of Lord (1870) L. R. 10 Eq. 17, 21; 39 L. J. ROMILLY in *Peacock v. Eastland* Ch. 534, 535.—R. C.

TOWNSON
v.
TICKELL.

will contained, whereupon he became and was continually from thenceforth, until and at the several times thereafter mentioned, remained and continued seised and possessed of the reversion of and in the said residue of the said demised premises; that is to say, seised of such reversion of and in divers parts of such residue in his demesne, as of fee, and possessed of such reversion of and in the other parts of such residue, for the residue of divers of the said long terms of years, then and still to come and unexpired. The declaration contained breaches of covenant, &c. General demurrer and joinder. The case was argued by

Manning, in support of the demurrer. * * *

[35] *Bayly*, *contra*. * * *

[36] ABBOTT, Ch. J.:

The law certainly is not so absurd as to force a man to take an estate against his will. *Primâ facie*, every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is so given. Of that, however, he is the best judge, and if it turn out that the party to whom the gift is made does not consider it beneficial, the law will certainly, by some mode or other, allow him to renounce or refuse the gift. The question here is, in what mode that refusal is to be made. In this case the renunciation has been by deed under the hand and seal of the party. It has been argued, however, that nothing short of renunciation or disclaimer in a court of record will avoid the devise; and if there had been any distinct authority to that effect, we should have been bound to give due weight to such authority. It does not seem to me, however, that the cases have gone the length of deciding, that the renunciation must take place in a court of record. The learned counsel has not been able to suggest any mode by which the devisee could have disclaimed in a court of record, and certainly it could not be done, unless some other person had thought fit to cite him, there to receive his *disclaimer; and if the estate were *damnosa hereditas*, that would not be likely to happen. It might, therefore, in some instances, be a matter of difficulty to made a disclaimer in a

[*37]

court of record. The case of *Thomson v. Leach* † seems to me to be a strong authority to shew, that that is not necessary. Three of the Judges there held, that an estate did not pass by surrender to the surrenderee till he expressly accepted it. Mr. Justice VENTRIS differed, and held that it passed immediately, liable to be divested by the dissent of the surrenderee. His judgment is, however, wholly founded on this, that a party to whom an estate is given, must be taken to give an implied assent to that which is for his benefit, till the contrary appears. That learned Judge expressly states, that a man “cannot have an estate put into him in spite of his teeth.” I concur in that opinion, and think that the renunciation here having been by deed under the hand and seal of the party, must have the effect of making the devise with respect to him null and void, and, consequently, that there must be judgment for the plaintiff.

TOWNSON
v.
TICKELL.

BAYLEY, J. :

I am of the same opinion. There are many instances in which a devise to a party might subject him to great inconvenience, as for instance, a devise of an estate clothed with trusts. And as in such a case, a party cannot be forced to be a trustee, it would be absurd that the estate should be in him and remain in him, until he can prevail upon some person to institute certain legal proceedings under which he is to disclaim in a court of justice? The good sense of the thing is quite the other way; the law indeed presumes, that the estate devised will be beneficial to the devisee, and that he will accept of *it, until there is proof to the contrary. Here is a renunciation by a most solemn act, viz. by deed; and by that he has said, that he did not choose to accept that which is devised to him. It seems to me, that the effect of that is, that the estate never was in him at all. For I consider the devise to be nothing more than an offer which the devisee may accept or refuse, and if he refuses, he is in the same situation as if the offer never had been made; and that being so, I am of opinion, that the disclaimer, in this case, was sufficient, and that there ought to be judgment for the plaintiff.

[*38]

† 2 Vent. 198.

TOWNSON HOLROYD, J. :

v.
TICKELL.

I think that an estate cannot be forced on a man. A devise, however, being *primâ facie* for the devisee's benefit, he is supposed to assent to it, until he does some act to shew his dissent. The law presumes that he will assent until the contrary be proved ; when the contrary, however, is proved, it shews that he never did assent to the devise, and, consequently, that the estate never was in him. I cannot think that it is necessary for a party to go through the form of disclaiming in a court of record, nor that he should be at the trouble or expense of executing a deed to shew, that he did not assent to the devise. Unless some strong authority were shewn to that effect, I cannot think that the law requires either of these forms. I am confirmed in that opinion by the case of *Bonifaut v. Greenfield*.† There the devise was to four executors : one of the executors refused to take out administration of the will, and it was objected, that the sale was not good ; to which it was answered, *that as it was devised unto him for the intent to sell, if he refused to sell he refused to take the estate, and so that it was unnecessary that he should join in the sale ; the Court, however, held the sale good, although the devisee had not renounced the estate either by matter of record or by deed. It seems to me, therefore, both upon the reason of the thing and the authority of this case, that the disclaimer need not be either by matter of record or by deed. In this case, however, the party has disclaimed by deed, which, in my opinion, is sufficient. The whole legal estate, therefore, is vested in the plaintiff ; and, consequently, he is entitled to the judgment of the Court.

[*89]

BEST, J. :

I am entirely of the same opinion. Although an estate is generally beneficial to the devisee, yet estates are often devised to persons as trustees for others. Now, if the only mode by which such trusts could have been renounced, was by disclaimer in a court of record, innumerable instances must have occurred : none, however, have been cited ; and that affords the strongest

† 1 Leon. 60 ; Cro. Eliz. 80.

argument against the necessity of having recourse to such a mode of proceeding. It seems to be contrary to common sense to say, that an estate should vest in a man not assenting to it: there must be the assent of the party, before any interest in the property can pass to him. It is stated in the declaration, that this party has, by his solemn deed, expressed his dissent, and renounced the estate devised by the will. It appears to me, therefore, that no interest ever vested in him; and, therefore, there is nothing more to be done for the purpose of giving the sole property to the plaintiff.

TOWNSON
v.
TICKELL.

Manning then urged, that the plaintiff had not conveyed to himself a good title to the lands, in which the testator had only a leasehold interest. The plaintiff now claims as personal representative of the testator; and the declaration states, that he, being one of several executors, assented to the bequest to himself. In Com. Dig. tit. Administration, C. 8, it is said, "If the devise be to one executor he may take, by his own assent, without the other." For which, the reference is to 1 Rol. 618 l. 47; but Rolle himself refers to 11 Hen. IV. 84 (*Brovingre's* case, T. 11 Hen. IV. fo. 83, 84, pl. 31) in which the only point decided was, that a legatee, who is named one of the executors, by taking the property bequeathed to him is estopped from saying that he never administered. He also referred to T. 5 Hen. VII. fo. 5, pl. 5.

[40]

Per CURIAM :

One co-executor may release a debt, and do other acts, without his companion, and he may therefore assent to a bequest to himself.

Judgment for plaintiff.

1819.
Nov. 6.

[47]

BURRELL *v.* JONES AND ANOTHER.

(3 Barn. & Ald. 47—51.)

The solicitor of the assignees of a bankrupt tenant, upon whose lands a distress had been made by the landlord, gave the following written undertaking: "We, as solicitors to the assignees, undertake to pay to the landlord his rent, provided it do not exceed the value of the effects distrained": Held, they were personally liable.

THIS cause was referred, by order of Nisi Prius, to an arbitrator, who ordered the verdict to be entered for the plaintiff for 30*l.* 16*s.* 9*d.*; but to enable the parties to take the opinion of the Court whether the action could be maintained against the defendants personally, he stated the following facts for the opinion of the Court, and he awarded, that if the Court should be of opinion that the action was maintainable, the award should stand; but if the Court should be of opinion that the action was not maintainable, a nonsuit or verdict should be entered for the defendant, as the Court should direct.

[48]

The plaintiff having let an estate called Glynllwgwy, to one John Lloyd Jones, and there being a considerable arrear of rent due, on or about the 19th February, 1817, he caused a distress to be made for such rent, and whilst his bailiff was in possession, the defendants, who were the solicitors of the assignees of the tenant, against whom a commission of bankrupt had issued, applied to the plaintiff's agent, Mr. John Houston, to deliver up the distress, and transmitted to him the following undertaking, signed by them the defendants.

"We, as solicitors of Thomas Mostyn Edwards, John Heaton, and John Powell Foulkes, esquires, assignees of the estate and effects of John Lloyd Jones, against whom a commission of bankrupt has been awarded, do hereby undertake to pay the Hon. P. R. D. Burrell, such rent as shall appear due to him from the said J. L. Jones, for the occupation of Glynllwgwy farm, within six weeks from the date hereof, provided such rent does not exceed the value of the effects distrained." Upon the delivery of the undertaking to Houston, he signed the following indorsement upon it. "To the within named T. Mostyn Edwards, John Heaton, and John Powell Foulkes, esquires, &c.

On behalf of the Hon. P. R. D. Burrell; I do hereby consent and agree to abandon the distress made on the goods, cattle, and chattels now being on Glynllwygwy farm, and to withdraw from thence the bailiff whom I have placed in possession thereof, in consideration of the within undertaking, for payment of the rent thereof, on a condition which I accept of and agree to. 24th February, 1817." The bailiff was accordingly withdrawn, and the goods, valued at 30*l.* 16*s.* 9*d.*, were afterwards sold by the assignees. At the trial, and also on the reference, it *was contended, that the action should have been brought against the assignees and not against the defendants. If the Court should be of opinion that the defendants had made themselves personally liable, the award was to stand for the sum of 30*l.* 16*s.* 9*d.*

BURRELL
v.
JONES.

[*49]

Reader, for the plaintiff, was stopped by the Court.

Denman, *contra* :

The defendants contracted merely on the part of the assignees; they expressly state, that they contracted as solicitors, which is expressive of the term agent. Now, where the party contracting is known to be a mere agent, he is not personally responsible, and he cited *Macbeath v. Haldimand*,† *Bowen v. Morris*.‡ Besides, here the plaintiff's agent himself has treated this as a contract with the assignees, and not with the defendants.

ABBOTT, Ch. J. :

I am of opinion, that the expression used in this undertaking, "we, as solicitors," binds those who personally signed it. Many persons will deal with solicitors and professional men (from the confidence they have in their known character and situation in life), who will not deal with an unknown client. It would be preventing much of the ordinary business of life, if we were to hold, that a solicitor entering into such a contract as this did not make himself personally responsible. It is for him to consider the probable effect of such an instrument before he signs

† 1 B. R. 177 (1 T. B. 172).

‡ 2 Taunt. 374.

BURRELL
v.
JONES.

[*50]

it. In this instance, the defendants, for their own security, ought when the goods were sold to have had the proceeds placed in their own hands, in order to pay the plaintiff. The case of *Macbeath v. Haldimand* stands on a very different principle. There the contract was with a known agent of government, for stores furnished for the public use, and there was no personal undertaking on his part; and that case has been followed by others to the same effect. In *Appleton v. Binks*† it was held, that one who covenanted for himself, his heirs, executors, &c. for the act of another, was personally bound by his covenant, although he described himself in the deed as covenanting for and on the part and behalf of such other person. That case is very like the present, and, upon the whole, I am of opinion, that by the language of this instrument, the defendants made themselves personally responsible, and that the verdict ought therefore to stand.

BAYLEY, J. :

I am of the same opinion. It is clear, that an agent may so contract as to make himself personally liable, and I think that the words here used, “we undertake,” are sufficient to place the defendants in that situation. The language of an instrument is to be taken most strongly against the party using it. Now when the defendants used the words, “we undertake to pay,” they in effect say, that they are the persons to whom the other party is to look for payment.

HOLROYD, J. :

[*51]

I am of the same opinion. The defendants, in this instrument, have used the words, “we undertake to pay.” Those words, therefore, are to be taken most strongly against themselves; and that being so, I am of opinion that the defendants are personally liable. *If they are not, nobody is bound by this undertaking; for it is perfectly clear, that the assignees are not bound. The import of the instrument is, not that the assignees undertake, through the medium of the defendants, as

† 7 R. R. 672 (5 East, 148, 1 Smith, 369).

their solicitors, but that they the defendants themselves, as solicitors, undertake. Now, strictly speaking, they cannot undertake merely in their character of solicitors; they have no power, as solicitors, to pledge the credit of their clients; consequently, they could not, as solicitors, bind the assignees. It is very intelligible, however, that being solicitors to the assignees under the commission, the defendants should personally undertake to pay the rent out of the value of the goods, provided that rent did not exceed the value of the effects distrained, and I think that must be taken to be the effect of the undertaking, and, therefore, that the verdict ought to stand.

BURRELL
v.
JONES.

BEST, J. :

I am of the same opinion. I think, that by this instrument, the defendants are personally bound. The term, "as solicitors," is merely descriptive of the character they fill, and which has induced them to undertake. In the case of *Appleton v. Binks*, the defendant undertook for and on behalf of another, yet he was held to be personally bound by the covenant; that case was by deed, and therefore was much stronger than the present.

Judgment for the plaintiff.

CARPENTER v. THORNTON.†

(3 Barn. & Ald. 52—58.)

1819.
Nov. 6.

[52]

An action at law is not maintainable upon a decree of a court of equity, for a specific sum of money founded on equitable considerations only; and therefore, where a bill was filed for the specific performance of an agreement for the purchase of an estate, and the decree was for payment of interest on the purchase-money and costs: Held, that no action at law was maintainable to recover such interest and costs.

THE declaration stated, that J. Norris exhibited his bill against the defendant in Chancery, for the specific performance of an

† The authority of this case is questioned by DENMAN, J. in *Marvill Iron Ore Co. v. Allen* (1878) 47 L. J. C. P. 598, 605. But, having regard to the discussion in *Bailey v. Bailey* (1884), 13 Q. B. Div. 855, 53 L. J. Q.

B. 583; *Chalk v. Tennant*, (1887) 57 L. T. 598, 599; and *Westmoreland, &c. Slate Co. v. Feilden*, (1891) 3 Ch. 15, 21, 60 L. J. Ch. 680; it cannot be said that this case is either overruled or obsolete.—B. C.

CARPENTER
v.
THORNTON.

agreement entered into by the defendant with J. Norris, for the purchase of an estate; and such proceedings were had, that afterwards, in the life-time of Norris, by a certain decree made in the said cause by the VICE-CHANCELLOR, it was declared, that the said agreement ought to be specifically performed; and it was ordered, amongst other things, that it should be referred to Mr. Campbell, one of the Masters of the Court, to compute interest after the rate of 5 per cent. per annum, on the sum of 5,500*l.*, the residue of the purchase-money, from the 3rd day of May, 1812, and to tax the said J. Norris his costs of that suit. The declaration then stated the death of Norris, and that the plaintiffs, as his executors, proved the will, and exhibited their bill of revive against the defendant in Chancery; and that by a decree of the VICE-CHANCELLOR the suit was revived; and that such proceedings were thereupon had, that on the 14th January, 1815, by an order of the VICE-CHANCELLOR, after reciting the aforesaid decree, and that there was then standing, in the name of the Accountant-General, in trust in the said cause, Bank 3 per cent. annuities to the amount of 8,139*l.* 1*s.* 10*d.*; and that there was then remaining *in the bank, in cash, 219*l.* 11*s.* 10*d.*, which the plaintiffs were desirous of having transferred, and paid to them in part discharge of the principal, interest, and costs due to them in the cause; and that it was prayed that the Accountant-General might be directed to transfer the same into the names of the plaintiffs, in part discharge of the principal, interest, and costs, directed to be paid to J. Norris, in the original cause, by the aforesaid decree, the plaintiffs thereby offering, on such transfer being made, to deliver up to the defendant the conveyance of the estate, with the title-deeds; it was ordered that the said sums of money should be transferred to the plaintiffs, according to their prayer, and upon the terms therein mentioned. The declaration then stated, that on the 3rd of August, 1815, the Master, by his report, computed the interest on 5,500*l.* from 3rd May, 1812, to 4th January, 1815, to be a certain sum therein mentioned; and that he had taxed the costs in the suit at a certain other sum, as by the said report, amongst other things, would appear; which said report was afterwards confirmed by the VICE-CHANCELLOR, of all which

[*53]

premises the defendant had notice. It then averred, that the decree was still in force, and that the plaintiffs had not obtained any execution or satisfaction thereon, but that the money thereby ordered to be paid was still wholly due and unpaid, whereby an action hath accrued to the plaintiffs, as executors, to demand the sum awarded for interest and costs. To this declaration there was a general demurrer. The case was now argued by

CARPENTER
v.
THORNTON.

Barnewall, in support of the demurrer :

There is no instance of an action having been brought upon a *decree of a court of equity, having the power to enforce its decrees in this country. In *Sadler v. Robins*,† Lord ELLENBOROUGH intimated, that a court of law would give effect to a decree of a court of equity; but that was the decree of a colonial court, which had no power to enforce its decrees in this country; and it appeared, besides, to have been a bill for an account which might be the subject of a claim in a court of law. The Court then called upon

[*54]

Selwyn, *contra* :

This is certainly a novel action; and if the argument of novelty were to prevail, it would be decisive. That ground of argument, however, was taken on former occasions, and considered as of little weight, especially by PRATT, Ch. J. in *Chapman v. Pickersgill*.‡ The principle on which the action of debt is founded is sufficient to maintain the present action. It is clear, from the authorities, that debt would lie, although there be only an implied contract. As if a man be found in arrear upon account. 1 Rol. 598, l. 47. So, though the account be made before auditors. Com. Dig. tit. Debt A 9. So, debt lies upon an award. Upon the same principle, debt will lie in this case. A court of competent jurisdiction having, by its judgment, ascertained a sum of money to be due from the defendant to the plaintiffs, that raises an obligation on the part of the defendant to pay, and thence the law implies a contract. Here the adjudication of the court of equity was final, for the

† 1 Camp. 253.

‡ 2 Wils. 146.

CARPENTER
 THORNTON.
 [*55]

Master's report had been confirmed by the VICE-CHANCELLOR ; and, *on that ground, this case is distinguishable from *Emerson v. Lashley*,† and *Fry v. Malcolm*,‡ where it was holden that actions could not be maintained on a mere interlocutory order. A decree of a court of equity stands in the same degree as a judgment at law, in the administration of assets. *Morice v. Bank of England*.§ In *Sadler v. Robins*, Lord ELLENBOROUGH seems to have been of opinion that such an action was maintainable, provided the action were brought upon a final adjudication.

ABBOTT, Ch. J. :

It has been suggested that there is, in this case, an implied contract, on the part of the defendant, to pay this money to the plaintiff, and therefore that a court of law ought to entertain this suit ; but, under the special circumstances of this case, I am at a loss to find any thing like an implied contract. If this were merely a bill filed for an account, and, upon the balance, a precise sum of money was found to be due, which might originally have formed the subject of an action at law, a court of law might, perhaps, in that case, lend its aid to enforce such a decree. Here, however, it appears by the declaration, that the testator filed his bill against the defendant, for the specific performance of an agreement for the purchase of an estate ; and that the VICE-CHANCELLOR decreed that the agreement should be specifically performed, and ordered that it should be referred to a Master in Chancery to compute interest on the sum of 5,500*l.*, the residue of the purchase-money, and to tax the plaintiff's costs. I suppose this was founded on the supposition, that the *purchaser was in possession. The declaration, after stating the death of the testator, stated that the plaintiffs, as his executors, revived the suit, and that the VICE-CHANCELLOR, on their petition, had ordered a sum standing in the name of the Accountant-General to be transferred to the plaintiffs, in payment of the purchase-money ; and then stated the report of the Master, by which a sum was found to be due to the plaintiffs

+ 3 R. R. 370 (2 H. Bl. 248).

§ 4 Br. P. C. 287, folio edition.

† 4 Taunt. 705.

[*56]

for interest on the residue of the purchase-money, and a further sum for costs, and that the VICE-CHANCELLOR confirmed the report. It appears to me, that the whole of this demand for the balance of interest and costs, arises out of this decree of the court of equity: and that it had no foundation prior to that decree. Now, I cannot say that a man, compelled by a court of equity against his will to pay a sum of money, impliedly agrees to pay the money. There certainly is not any express contract. It seems sufficient for me to say, in this case, without laying down any general rule on the subject, that the only ground upon which this case has been put in argument, viz. that of an implied contract, wholly fails; and that being so, there must be judgment for the defendant.

CARPENTER
v.
THORNTON.

BAYLEY, J.:

The foundation of the suit in equity, in this case, seems to have been an equitable obligation, on the part of the defendant, to pay the money. This suit, if it can be maintained at all, must be founded upon a legal obligation to pay. The decree in equity merely ascertains that the defendant is under an equitable obligation to pay: it does not go further, and shew that there is any legal obligation. The case of *Emerson v. Lashley* seems to be analogous to this case. There an *action was brought to recover a sum directed to be paid by an interlocutory order of an inferior court. Although that order produced a moral obligation to pay, the Court of Common Pleas decided that it did not form any ground for an action at law. It seems to me, that in this case the decree, founded only upon an equitable obligation, does not furnish any foundation for an action at law.

[*57]

HOLBOYD, J.:

I am of opinion that this action is not maintainable. The decree does not affect to decide what was actually due, in point of law, on the balance of an account, but it merely directs what is to be paid on an equitable consideration. It is said, however, that the law will, in such a case, imply a promise to pay. In the case of judgments of inferior courts, and courts not of

CARPENTER
v.
THORNTON.

record, where the law implies a promise to pay, it is to pay a legal debt. Wherever there is a debt at law, the Court will presume that the party promises to do that which the law requires. When the debt is founded upon equitable considerations alone, it may be enforced by the authority of the Court which ordered it to be paid. The law, in such a case, does not imply a promise. There is no instance of an action brought on a rule of Court for payment of money. The mode of enforcing such an order is by attachment, for contempt in not obeying the order of the Court. Now, although that does not absolutely shew that such an action is not maintainable; yet, where no such action has ever been maintained, it lies on the party bringing such action to state a clear principle on which it is maintainable. In references at Nisi Prius, which are afterwards made rules of Court, a verdict is usually taken to secure the payment *of the money which may be awarded: unless that be done, the award is invariably enforced by attachment. In *Tremenhere v. Tresillian*,† it is said that upon such a rule an action might be maintained. In such cases, however, the rule is made with the consent of the parties: and when they consent to the rule, they consent to the submission, and the breach of that submission is the foundation of an action. Although the parties, by entering into the rule, may have subjected themselves to the further obligation of obeying the order of Court, the neglect of which may be punished by attachment, yet the breach of the submission is the ground of the action. Admitting, however, that an action might be maintained on a rule of Court made with the consent of the parties, it by no means follows that an action will lie upon a rule of Court obtained *in invitum*. Such an order does not constitute a legal debt, which alone the law will imply a promise to pay. This decree of the court of equity does not, therefore, constitute such a debt. It must, therefore, be enforced by the Court which made it, and is not the subject of an action at law.

[*58]

BEST, J.:

The object of this action is to enforce a mere equitable

† 1 Sid. 452.

demand, founded upon an order of Court. Now, in *Fry v. CARPENTER*
Malcolm, the Court of Common Pleas were of opinion, that an ^{o.}
 action was not maintainable upon an order of Court for the THORNTON.
 payment of money. It seems to me, that the principle of that
 case applies to the present, and consequently that there must be
 judgment for the defendant.

Judgment for the defendant.

CUMING v. HILL.

(3 Barn. & Ald. 59—60.)

1819.
 Nov. 6.

[59]

Covenant upon an indenture of apprenticeship, by the master against the father; breach, that the apprentice absented himself from the service; plea, that the son faithfully served till he came of age, and that he then avoided the indenture: Held, that this was no answer to the action.

ACTION of covenant on an indenture of apprenticeship, in the common form, by the master against the father of the apprentice. The breach assigned was, that the apprentice had absented himself from the service. Plea, that the apprentice, at the time of making the indenture, was an infant, of the age of seventeen years; and that on the 20th October, 1818, he attained his full age of twenty-one years, until which time he faithfully served the plaintiff, according to the meaning of the indenture; and after he had attained the age of twenty-one years, he, on the 21st October, 1818, made void the indenture and quitted the service of the plaintiff, as it was lawful to do under the statute 5 Eliz. To this plea there was a general demurrer.

Abraham, in support of the demurrer, cited *Branch v. Ewington*,† and

Bayly, *contra*, being then called upon by the Court, admitted that he could not support the plea.

ABBOTT, Ch. J.:

I am of opinion that the father is liable to this action. He

† 2 Doug. 518.

CUMING
v.
HILL.

[*60]

covenants that the son shall faithfully serve; the avoidance of the apprenticeship by the son during the term, cannot discharge the father's covenant. The indenture of apprenticeship has existed *in this form for more than a century, and has been in universal use. A construction has been put upon the instrument in a court of law, in the case cited from Douglas.† I do not see any reason to doubt the propriety of that decision, and I think, therefore, upon principle as well as upon authority, that the defendant is answerable in this action.

BAYLEY, J.:

I may bind myself that A. B. shall do an act, although it is in his option whether he will do it or not. The father here binds himself that the son shall serve seven years. It is no answer in an action brought against the father, for the breach of that covenant, for him to say that it was in the option of the son whether he would serve or not. If the son does not choose to do that which the father covenanted he should do, the covenant is then broken, and the father is liable.

HOLROYD and BEST, JJ. concurred.

Judgment for the plaintiff.

1819.
Nov. 6.
[72]

JOHNSON v. W. DEALTRY, CLERK, AND T. C. R. REID,
CLERK, J. GRAY, AND W. WARE.

(3 Barn. & Ald. 72—89.)

A district, situate within the local limits of the county of York, from time immemorial had been part of the county of Durham, yet had always contributed to the public burdens of the county of York: Held, that it was to be presumed that such district, either in the original division of land into counties, or at some subsequent period (when it was separated from the county of York), was made part of the county of Durham on condition of its contributing to the burdens of the county of York, and that such district was liable to the county-rate of Yorkshire.

TRESPASS for taking two horses of plaintiff, on the 3rd of May, 1815, at Craike, in the county of Durham. Plea, not guilty.

† *Branch v. Ewington*, 2 Doug. 518.

The cause was tried at the Northumberland Assizes, 1817, when a verdict was found for the plaintiff, 13*l.* 10*s.* damages, subject to the opinion of the Court on the following case.

JOHNSON
v.
DEALTRY.

The plaintiff was petty constable of the district of Craike, and the defendants justified the trespass under a warrant of distress issued by two of them, who were justices for the North Riding of Yorkshire, in consequence of plaintiff's refusal to pay the amount of the assessment of Craike to the county rate of the North Riding. The district of Craike is a manor, and ancient possession of the bishops of Durham, situate in the North Riding and in the wapentake of Bulmer, at some distance from the body of the county of Durham, but from time immemorial it has been and is a part of the county of Durham. There are justices of the peace resident in, and exercising jurisdiction over, the district of Craike, who are appointed by and act under the commission of the peace for the county of Durham, and not for the North Riding of Yorkshire. The freeholders of Craike have always voted in county elections for Durham, and not for Yorkshire. The fines of lands in Craike have always *been levied in the courts of the county-palatine of Durham. At the trial, various instances were produced of prosecutions for offences committed at Craike, which had been tried at Durham, and in which costs were paid to the prosecutor out of the county-rate; and, on the other hand, similar instances were produced, from which it appeared that the justices of the North Riding had exercised a jurisdiction, both civil and criminal, with respect to matters arising within the township of Craike, and that from the year 1615, the inhabitants of Craike were assessed to the rates of the North Riding. In 1674, the rate was raised from 35*l.* to 60*l.*; and in 1737, the inhabitants of Craike, having refused to pay their usual assessment, the magistrates of the North Riding ordered a case to be prepared for the opinion of counsel. On the 27th April, 1742, three years after the passing of the 12 Geo. II., c. 29, the inhabitants of Craike again refused to pay the rate. The magistrates directed any two justices to grant a warrant of distress to levy, and that the Court should indemnify the chief constables in levying the distress. On the 8th October, 1745, by order of sessions, reciting that the township of Craike had long been

[*73]

JOHNSON
v.
DEALTRY.

[*74]

reputed part of the county of Durham, yet that it had always been taken as part of the wapentake of Bulmer; and had always been, from time immemorial, assessed to, and paid all manner of public taxes charged for the North Riding, as part of that wapentake, until about nine years before, and that nothing had since been done by the proper officers employed for recovering the same; it was ordered, that the chief constable employed to levy the same should be indemnified. By another order of sessions, made at the York Midsummer adjourned *sessions, 1747, reciting that the constables of Craike had absolutely refused to pay their proportion of the county-rates for the space of eight years, and that thereupon the Court had ordered, that the justices residing in the said wapentake should be empowered to grant such warrants, and pursue such measures, as they should think proper for the recovery thereof; and that certain magistrates, therein mentioned, did grant their warrant, empowering the chief constables of the wapentake to make distress upon the goods of the constable of Craike, for satisfying the arrears of the rates; and that, accordingly, a distress had been made upon his goods, but that he still refused to pay the same, upon pretence that Craike was always reputed part of the county of Durham, and therefore not liable to the payment of rates in the county of York; that a replevin was sued forth for the goods distrained, and a suit in law was commenced to settle the right in question; but that the petty constable, being better advised, had, with the consent of the rector and the principal inhabitants, applied to the justices to cease all further proceedings, and had submitted to pay the rates and arrears thereof, and for the future to continue to pay the same as they should become due, as anciently, from time immemorial they had, and of right ought to have done; it was then ordered, that all further proceedings should cease, and that the constables, churchwardens, and overseers, and other substantial inhabitants of Craike, should tax every inhabitant of the said parish to raise the sum assessed. At the same sessions, there was a petition of the freeholders, copyholders, poor tenants, farmers at rack-rent, inhabiting the town and parish of Craike, stating *that they had been inadvertently drawn in to bring on themselves a lawsuit, in consequence of

[*75]

the non-payment of the county-rates, which they were advised not to pay, as their parish was reputed to be parcel of the county of Durham, and not of the county of York ; but, that being now convinced of their error and mistake, and satisfied that they ought to pay the county-rates of the North Riding, they promised for themselves and their successors to pay the rates constantly, as they were anciently accustomed to do, and also to pay the arrears due ; and prayed the justices to remit part of the arrears. Then followed an order of sessions, that the arrears should be discharged upon payment by the petitioners of one-half of the assessment. The district of Craike, from the time of the conclusion of this dispute, always contributed to the county-rate of the North Riding, as if it had been a part thereof. With respect to the payment by Craike before the said dispute, and also before the 12 Geo. II. of those rates, for which the general county-rate was in that year substituted, the following documents were produced in evidence at the trial. A book called “*Nomina Villarum*,” found amongst the records of the North Riding sessions, the antiquity of the beginning of which was uncertain, but in which, at all events, there were entries in 1727 and 1735, and which purported to contain accounts of the several towns within every division of the North Riding. In this book Craike was enumerated as one of the towns within the wapentake of Bulmer. By an order, dated in 1735, it appeared that several sums were estreated throughout the whole North Riding for *certain purposes, viz. 1st, a relief of prisoners in York Castle ; 2nd, hospital money ; 3rd, wages of governor of house of correction ; 4th, bridge money ; 5th, charges of soldiers’ baggage ; 6th, money for the conveyance of vagrants ; 7th, for purchase of a register house. At the end of that order, followed a computation of the proportion in which the different divisions of the North Riding were to contribute to these estreats, and the proportion of Bulmer was computed among the rest ; but there was no computation for the proportion of the townships in the several divisions, and the name of Craike was not mentioned. The defendants, also, produced the duplicates of the assessment of the North Riding to the land-tax, from the time of the passing of the first Land-tax Act, 4 W. & M. c. 1, in regular

JOHNSON
v.
DEALTRY.

[*76]

JOHNSON
c.
DEALTRY.

succession, down to the time of the trial, from which it appeared that the township of Craike had been uniformly assessed to the land-tax, together with the rest of the wapentake of Bulmer, and paid its proportion to the chief constable of that wapentake. In the appointments of the collectors of the land-tax, Craike was described as the township of Craike, in the county of Durham, and within the land-tax collection of the division of Bulmer. The case was argued by

Grey, for the plaintiff. * * *

[81]

Tindal, *contra* :

After observing that Craike had, from the earliest period of which there was any evidence, been assessed to the burdens of the North Riding, was stopped by the Court.

ABBOTT, Ch. J. :

This action seeks to set aside the usage which has prevailed, not only as far back as the memory of living persons can go, but as far back as any written document applicable to the subject can be found. Now we certainly ought not to overturn that usage, if, by any reasonable intendment, it can be supposed to have had a legal commencement. In the opinion that I am about to deliver, I wish to be understood as not deciding on the question of the jurisdiction civil or criminal, of the magistrates of the North Riding, over the township of Craike. My judgment is confined solely to the point, whether Craike, admitting it to be parcel of the county of Durham, for some purposes, is assessable to the rates of the county of York. I am of opinion, from the evidence laid before us, that Craike is liable to contribute to the county-rates of the North Riding. From time immemorial Craike has been parcel of the county of Durham; whether it became so at the time of the original separation of the land of the two counties of Durham and York, or whether, having been originally part of the county of York, it was made part of Durham, when the latter became a county-palatine, in consequence of being parcel of the possessions of the Bishop of Durham, we

[*82] *do not know. When either of these events, however, took place, it may possibly have happened, that it was then settled that

JOHNSON
v.
DEALTRY.

Craike should be contributory to the burdens of the county of York, and not to those of Durham. Then, if that may have been done, the question, on the evidence before us, is, whether we ought not to conclude, that what might lawfully have been done at one or other of those periods, was in fact done. All the usage leads to that conclusion, and there is nothing against it. A very strong argument, also, in favour of that conclusion, is deducible from the Act establishing the land-tax, which became a substitute for aids and other rates which were of a local nature and were collected in separate districts. Now the 4 W. & M. c. 1, s. 28† (which was the first Land-tax Act) provides, that “all places, constablewicks, divisions, and allotments, which have used to be rated and assessed, shall pay and be assessed in such county, hundred, rape, wapentake, constablewick, division, place, and allotment, as the same hath heretofore been assessed in, and not elsewhere.” From the time of passing that Act to the present moment, the district of Craike hath always been assessed in the North Riding; and the only mode of accounting for that is to suppose, that, before the passing of that Act, it was assessed to the public burdens of the North Riding, and not to those of Durham. None of the documents go so far as to shew, that there ever was a time at which this township was not assessed to some of the public burdens of the North Riding; for it appears at all times to have been assessed to the repairing of bridges, and the character of that species of evidence is much higher than that of all the other in a question relating to a county-rate; for the repairing of bridges is coeval with the common law. *If then, from time immemorial, the rates assessed locally upon the township of Craike, were applicable to the North Riding, it seems to me that it may fairly be presumed, that it was specially reserved and provided, either on the original separation of the land into counties, or on the taking away of the district from the North Riding, and placing it in the county of Durham (if that did in fact take place), that it should contribute to the burdens of the North Riding, and not to those of Durham; and, if so, we ought to conclude that such reservation was made, and, to give effect to it, we must decide that this

[*83]

† Repealed, Stat. Law Rev. Act, 1867.

JOHNSON
v.
DEALTRY.

district ought to contribute generally to the rates and burdens of the North Riding. It will not, however, follow, from our decision that the inhabitants of Craike must, therefore, contribute to the register house. My opinion goes only to the liability of contributing to the county burdens. I wish to be understood, as pronouncing no opinion on that question, or on the question as to the jurisdiction of the magistrates in civil or criminal cases.

BAYLEY, J.:

[*84] This is partly a question of law, and partly a question of fact ; as a jury, however, upon the evidence stated, could only find a verdict one way, and, if they found otherwise, it would be the duty of the Court to grant a new trial, it seems to me that we are at liberty, without breaking in upon the province of the jury, to deliver our judgment on the case as now stated. The 12 Geo. II. c. 29, directs the justices to levy the county-rates within the limits of their respective jurisdictions. The question of fact, therefore, is, whether for the purposes of the county-rate the township of Craike is within the jurisdiction of the North Riding *magistrates. It seems to me that the evidence is all one way. I think it quite clear, for the reasons already given by my Lord Chief Justice, that a place may be in one county for certain purposes, and for certain other purposes not in the county. Craike is within the local limits of the North Riding, yet from time immemorial it has been part of the county of Durham. Whether it was made part of that county on the original division of the kingdom into counties, we cannot exactly tell ; it has always, however, been part of the county of Durham : yet, as far back as there can be any trace, it has constantly contributed to the burdens of the North Riding. Now whether this took place on the original distribution of the kingdom into counties, or whether it became so on any subsequent separation, it may, in either case, have been made part of the condition on which it was made parcel of the county of Durham, that it should continue its contributions to the North Riding. Now, on the question, whether we are to consider this township to have contributed to the burdens of the North Riding from time immemorial, the usage is all one way. The 12 Geo. II. c. 29, passed in 1789, and in 1747, within eight

JOHNSON
v.
DEALTRY.

years after the passing of that statute, a dispute takes place on this very point, and it appears, that the constables of Craike had refused to pay the county-rates for eight years, and that a distress was made upon the goods of the constable of Craike, who refused to pay on the ground that Craike was part of the county of Durham. A replevin was sued out to try the question, but the constable of Craike, with the consent of the rector and principal inhabitants, applied to the justices to cease all further proceedings, and submitted to pay the rates as from *time immemorial they had done. These proceedings must have made the subject notorious to the inhabitants of the district of Craike, and the counties of York and Durham. They must, at that time, have inquired as to what was the immemorial usage. There is then a petition from the inhabitants of Craike stating that they had been inadvertently led to dispute the right, but that they were convinced of their error, and they promise, for themselves and their successors, to pay the rates to the North Riding for the future, and then the prayer of the petition is to remit the arrears. It appears, therefore, that when this was made matter of contest in 1747, the inhabitants of Craike acquiesced in the rate. If the case stood here it would have furnished very strong evidence of an immemorial usage to contribute to the burdens of the North Riding. But it does not rest here; for, from the commencement of the land-tax in 1692, the inhabitants of Craike have invariably contributed to the North Riding collection. Now the 4 W. & M. c. 1, provides, "that all places shall contribute to those counties and places to which they have been anciently used to make their contributions." If, therefore, under the first assessment, the inhabitants of Craike were rated to the North Riding, and not to Durham, it is an admission on their part, that they have been anciently used to pay their contributions to the North Riding. It cannot be said that this was paid inadvertently, for what was the county of Durham doing from the commencement of all time in that respect? The township of Craike, a parcel of the county of Durham, and therefore, generally speaking, liable to contribute to the Durham burdens, has never contributed to them. Although liable to *be called upon for a contribution for the land-tax, it is still never done. The North

[*85]

[*86]

JOHNSON
v.
DEALTRY.

Riding, which, apparently, would not be entitled to call upon the district of Craike for contribution in that respect, is constantly calling upon them. There is also another document not immaterial in this case; it is that which directs the rate to be raised from 45*l.* to 60*l.* Now is it likely that the inhabitants of Craike would consent to pay such an increased contribution unless they had known that there was a usage which bound them to make that contribution? Without, therefore, entering into the question, how far the magistrates of the North Riding have jurisdiction in the township of Craike, it appears to me quite clear, that, for the purposes of the county-rate, Craike is within the limits of the North Riding, and, consequently, that the present assessment was duly made.

HOLBOYD, J.:

I am also of opinion, from the statement made in this case, that the district of Craike is assessable to the county-rates of the North Riding of Yorkshire. The evidence on this subject is all one way. The statement in the case, as to the jurisdiction which the Durham magistrates have exercised over this district, does not, in my opinion, impeach the other evidence with respect to its rateability. Originally, the district of Craike might have been (and I think it must be taken to have been), part of the North Riding itself. For particular purposes, it might have been made part of the county of Durham, with the exception, however, of its liability to bear the burdens of the North Riding of Yorkshire. It is clear that it may, in point of law, have been so separated from the county of York, *with a saving and exception of the rights of the inhabitants of the county out of which it is taken; for in *Sherry v. Richardson*,† it is laid down, that as the King, by his letters patent, may make a county, and exempt this from any other county, so may he, in the making of it, save and exempt to him and his successors, such part of the jurisdiction or privilege which the other county, out of which it is exempted, had in it before; and in *Rex v. Gough*,‡ it was expressly held, that the shire hall of the city of Gloucester, which, by charter, was made a county of itself, is for the purpose of trying causes

[*87]

† Popham, 16.

‡ Doug. 791.

within the county of Gloucester. That was an indictment for perjury committed in the shire hall, and the venue was in the county of Gloucester, and the Court there held, that the venue was well laid in the county, the shire hall continuing part of the county for the purpose of trial. Then if this might be so by charter, it might be so by prescriptive usage. Now if Craike became part of the county of Durham, by grant to the Bishop, nothing could be more reasonable, than that, when it was so made for the purposes of jurisdiction, there should be a saving and general exception of its liability to contribute to the burdens of the North Riding; for otherwise, the burdens of the rest of the inhabitants would be increased by the separation. That being so, and it appearing from the evidence that Craike has always contributed to the county-rate of the North Riding, it results, as a presumption of law, that it is for that purpose part of the North Riding. At the trial the Judge must have told the jury that they ought to presume that it had originally been *part of the North Riding, and therefore, in law, bound to contribute to its burdens. If the jury, without any evidence, were to find a contrary verdict, it would be the duty of the Court to grant a new trial. We are bound, upon the evidence stated to us, to draw the same presumption of law. I am therefore of opinion, that the district of Craike is liable to contribute to the county-rate of the North Riding of Yorkshire, although, for other purposes, it is to be taken to be part of the county of Durham.

JOHNSON
v.
DEALTRY.

[*88]

BEST, J. :

The question appears to me rather a question of fact than a question of law. The difficulty in this case arises from Craike being part of the county of Durham. The only question of law is, whether the King has the power to place a portion of one particular county under the jurisdiction of the magistrates of another county; and if he has, then the question of fact arises, whether in this case that has been actually done. Now I am clearly of opinion that, by the law and constitution of this realm, the King might give to the magistrates of Durham the power to exercise jurisdiction within this district. It appears to me that Craike was originally part of the county of York. Whenever it

JOHNSON
v.
DEALTRY.

[*89]

became part of the county of Durham, it may have been considered convenient to give to the magistrates of the county of Durham civil and criminal jurisdiction within the district, and still not to exempt it from the burdens of the county of York ; for it might have been most unjust so to do. All the evidence shews that that has been done for certain purposes, and there is not any instance of its having ever contributed *to the burdens of Durham. I, therefore, think that this district was properly assessed to the county of York.

Judgment for the defendants.

1819.
Nov. 6.

[101]

WIGLEY v. ASHTON AND OTHERS.

(3 Barn. & Ald. 101—102.)

A count in assumpsit against husband and wife, who was administratrix with the will annexed, upon promises by the testator to pay rent, cannot be joined with counts upon promises by the husband and wife, as administratrix, for use and occupation by them after the death of the testator.

[*102]

ASSUMPSIT by plaintiff, against Mary Noble Ashton, widow, the Rev. Henry Denny Berners, clerk, and Sarah his wife, William Berners, and Rachel Allen, his wife, and Henry Fitzwilliam Bernard, and Frances, his wife, which said Mary Noble, Sarah Rachel Allen, and Frances, are the administratrixes of Richard Miler, *deceased, with the will annexed. The first count stated, that Miler, the deceased, was tenant to the plaintiff of certain premises therein mentioned, from year to year, and that he, the testator, promised to pay rent during the continuance of the tenancy ; it was then averred, that the tenancy continued until the 28th August, 1818, and that a quarter's rent was due. The second count was also on a promise by the testator. It is unnecessary to state the third count, as the Court did not pronounce any judgment upon it. The fourth count stated, that the said H. Denny, W. Berners, and H. Fitzwilliam, whilst they were so married as aforesaid, and the said Mary Noble, Sarah Rachel Allen, and Frances, as such administratrixes as aforesaid, were indebted to the

plaintiff for the use and occupation, &c. of the premises by the said H. Denny and W. Berners, and H. Fitzwilliam, whilst they were so married as aforesaid; and the said Mary Noble, Sarah Rachel Allen, and Frances, as such administratrixes, as aforesaid. Then promises were laid by the three husbands, and their wives, and Mary Noble, as administratrixes. To this declaration there was a general demurrer.

WIGLEY
v.
ASHTON.

The COURT, after hearing *Tindal* in support of the demurrer, and *Chitty*, *contrà*, who cited *Pearson v. Henry*,† *Tugwell v. Heyman*,‡ *Powell v. Graham*,§ and *Thompson v. Stent*,|| were clearly of opinion that this was a misjoinder, inasmuch as the fourth count made the defendants personally liable, and the first two counts made them liable only to the extent of assets.

Judgment for defendants.

THE KING v. THOMAS MILTON.

(3 Barn. & Ald. 112—120.)

1819.
Nov. 6.

[112]

Where a river navigation extended through several parishes, and certain tonnage dues became payable in respect of goods carried along the line of navigation, and landed at a wharf locally situate within the parish of B. : Held, that a rate on the proprietor of those dues for their whole amount in the parish of B., stated to be for river tonnage, could not be considered as a rate upon that part of the river locally situate within the parish of B., but as a rate upon the parts of the river situate as well within as without the parish, and that it could not, therefore, be supported: Held, also, that the 41 Geo. III. c. 23, s. 1, does not give the Court of K. B. the power of amending a poor-rate.

UPON an appeal against a rate made for the relief of the poor of the parish of Bengworth, within the borough of Evesham, in the county of Worcester, whereby one Thomas Milton was rated for "River tonnage at 100*l.*—6*l.*" The Sessions confirmed the rate, subject to the opinion of this Court on the following case :

The appellant was a yearly tenant under George Wigley Perrott, Esq., and Jane Perrott, widow, of that part of the

† 2 R. R. 523 (5 T. R. 6).

§ 18 R. R. 593 (7 Taunt. 580).

‡ 13 R. R. 810 (3 Camp. 298).

|| 1 Taunt. 322.

THE KING
v.
MILTON.

navigation of the river Avon called the "Lower Navigation," which runs through the counties of Worcester and Gloucester, from the lock or sluice above the bridge at Evesham to the junction of the Avon with the Severn at Tewkesbury. The conveyance under which Mr. Perrott's family held this property was dated the 17th June, 1760, and conveyed to them "all that the navigation and profits of navigation, and passage for boats, upon the Avon, situate in the counties of Worcester, Warwick, and Gloucester, to and from the Severn, up and down the Avon, unto and from the lock and sluice next above the bridge at Evesham; and also all storehouses, sluices, locks, &c. belonging to the river Avon, and the navigation thereupon, to and from the Severn, up and down the Avon, unto and from the lock and sluice next above the bridge at Evesham, together with all the tolls, rates of tonnage, &c. to the navigation belonging." By an Act passed the 24 Geo. II. 1751, [*118] entitled, "An Act for *the better regulating the navigation of the river Avon, running through the counties of Warwick, Worcester, and Gloucester, and for ascertaining the rates of water-carriage," it was enacted, "that the said river Avon shall for ever thereafter be a free river, and all persons shall have liberty of passing and repassing up and down the said river with boats, barges, lighters, and other vessels laden with coal, or any other sort of goods, and shall have liberty to sell and vend the same to any persons, at such reasonable prices as they shall think fit and can get for the same; and to land the same, with the consent of the owners or occupiers of the land, at such wharfs as shall be thought most convenient, paying, or securing to be paid, to the owners and proprietors of the navigation, certain rates of tonnage for all goods and merchandises carried on the said river." The appellant was not an inhabitant or occupier of any messuage or tenement whatsoever in Bengworth, but resided in the parish of All Saints, Evesham, on the opposite side of the river, which flowed between the two towns of Bengworth and Evesham, part of the river being within the parish of Bengworth, and other part of it being within the parish of All Saints, Evesham, both which parts were navigable, and used by vessels passing along the river. On the Bengworth side of

the river, and within the parish, there was a wharf communicating with the river belonging to one Day, where goods were landed annually, yielding tonnage dues to the amount in the rate assessed; but no tonnage dues were received by the appellant in the parish of Bengworth, nor was any account given of them in that parish to the appellant; but, as a check upon the boatmen, an account was taken at the wharf, by Day's servant, of all the goods landed there, *which was sent over to the appellant at his house, in the parish of All Saints, Evesham, where the boatmen accounted to him; and he usually received all the tonnage dues on goods brought up the river from Pershore to Evesham, and landed either in the parish of All Saints, Evesham, or in the parish of Bengworth; though, if he did not happen to be in the way when the boatmen called to give an account of and pay the tonnage dues, at the office in All Saints, Evesham, they accounted for and paid them on their return back, after unlading, at the appellant's office in Pershore, where he collected the tonnage dues from those who proceeded no further up the river than to Pershore, or any place above that; but, short of Evesham, there was no lock or sluice within the parish of Bengworth, and when the tonnage dues were paid at Evesham, the boatman took back with him a certificate from the appellant of his having paid the dues at Evesham, in order to enable him to repass the sluice through which he came up loaded, which was situate at Pershore, and which was kept locked. The same amount of tonnage was due and payable by every vessel which passed Pershore sluice in its way to Evesham or Bengworth, whether it proceeded as high as either of those places, or unloaded and delivered at any intermediate place, which was frequently the case, and which distance included eight different parishes where goods might be landed.

THE KING
v.
MILTON.

[*114]

Peake, in support of the order of Sessions. * * *

Puller, *contrà*, was stopped by the COURT.

[115]

ABBOTT, Ch. J.:

I am of opinion, that this rate, which has been made on the

[116]

THE KING
v.
MILTON.

river tonnage, cannot be sustained. It has been contended, that by the words "river tonnage," we may understand the profits arising only from that part of the river which lies within the parish of Bengworth. It seems to me, however, that we cannot so understand those words, for they are explained to us by the subsequent facts stated in the case. From these facts, it clearly appears, that the profits accrued in respect not only of the use of that part of the navigation which was within the parish of Bengworth, but also from the use of the other parts of the navigation, situate in the different parishes through which the goods had passed. This is, therefore, in substance, not a rate upon the profits of that part of the river only which is situated within the parish of Bengworth, but a rate upon the tonnage dues payable at the wharf there, in respect of the carriage of the goods through the other parishes. Unless, therefore, we are to supersede all the late cases by which it has been held, that tolls *per se* are not rateable, we are bound to say, that these tonnage dues are not subject to this rate. The order of Sessions must, therefore, be quashed.

BAYLEY, J. :

I am of the same opinion. Since the case of *The King v. Nicholson*,† the Court have held themselves bound to see clearly that the property rated comes within the words of the 43 Eliz., by which the rate is directed to be "by taxation of every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, tithes impropriate, propriations of tithes, coal-mines, or saleable underwoods, in the parish." Now the party here, not being an inhabitant, *must be brought within some of the other words, and the only other words applicable to this case are "occupier of land." Now in *The King v. Tynemouth*‡ it was decided, that the tolls of a lighthouse, situate in the parish of Tynemouth, but collected in the several ports at which the vessel, passing along the coast, afterwards arrived, were not rateable *qua* tolls in the township, and the rate was held to be bad. In *The King v. Nicholson* the party was rated for the tolls of a ferry; he was not an inhabitant, nor did he occupy any

† 11 R. R. 398 (12 East, 330).

‡ 11 R. R. 328 (12 East, 46).

lands or tenements, for he was not entitled to the land on either side of the river over which the ferry extended. The Court then considered the cases of *The King v. Cardington*,† and *The King v. The Aire and Calder Navigation*.‡ The former case does not fall within the principle laid down in *The King v. Nicholson*; it was a rate for the toll of a sluice, and the party was the occupier of the sluice within the parish in which the rate was imposed. The sluice being landed property, the party was properly rated for the tolls yielded by the sluice within the parish. The cases of *Rex v. The Aire and Calder Navigation*, and *Rex v. Page*,§ certainly do not admit of that distinction. Those decisions, however, were expressly overruled by this Court in the case to which I have alluded. In *Rex v. The Staffordshire Canal*,|| the company were rated “for their basins, towing-paths, and that part of their canal and locks lying within Lower Mitton, and for the tolls and duties arising therefrom, due at Lower Mitton;” so that it appeared on the rate itself, that though it was nominally a rate upon tolls, yet it was on such tolls as arose from rateable property *within the parish. In *The King v. Sir Archibald Macdonald*,¶ the rate was for the Rochdale Canal Lock Tunnel dues or rates. Now if those dues or rates had arisen from property partly within the parish and partly without it would have been like the present case. The only dues which the party was entitled to receive in that case were dues in respect of vessels passing through the lock, which lock lay within the parish; and, therefore, all the tolls and dues there arose from what may be called parish property. The rate in this case is for tonnage dues, and it would be a good rate, provided it could be shewn that the tonnage arose wholly from the use of rateable property within the parish. It is stated, however, that the canal passes through several parishes. The tolls, therefore, which are collected for goods landed at the wharf in the parish of Bengworth, are payable to the proprietor as a compensation for the use of the whole line of the canal through which the goods pass, and not merely for the use of that part of the canal which lies

THE KING
v.
MILTON.

[*118]

† Cowp. 581.

|| 4 R. R. 683 (8 T. R. 340).

‡ 1 R. R. 579 (2 T. R. 660).

¶ 11 R. R. 396 (12 East, 324).

§ 2 R. R. 454 (4 T. R. 543).

THE KING
v.
MILTON.

[*119]

within the parish of Bengworth. It is a rate, therefore, upon profits arising partly within and partly without the parish ; and, upon that ground, I think that the rate cannot be supported ; and, if it cannot, the case of *Rex v. The Mayor of Bath*† is an authority to shew that the rate must be quashed. In that case the rate was upon certain springs and reservoirs ; and the question was, whether the springs and reservoirs were rateable property ; and the Court decided that they were ; but the whole of the rate having been imposed on one parish, the Court were of opinion that it ought to have been imposed on different parishes, and that the parish *in which the reservoir was situate ought to have been assessed for the value of that, and that the parishes through which the pipes conveying the water passed ought to have been assessed for the value of the profits arising therefrom. It seems to me, therefore, that this rate, having been imposed on property partly within and partly without the parish, is bad ; and that it is not a mere objection to the quantum of the rate.

HOLBOYD, J. :

It is now to be considered as an established rule, that tolls *qua* tolls are not rateable. I do not mean to say, however, that a rate may not be made on rateable property under the denomination of tolls, provided that property from which the tolls arise be within the parish, and the rate be confined to that property. Here the rate is upon tonnage dues. It is said that the property rated is rateable property within the parish where the tonnage dues became payable, and that, therefore, this is to be considered as a rate upon that rateable property. I think, however, that this is a rate, not only on rateable property within the parish, but on other property, which, though rateable, is rateable in another parish, and not in this. The case states, that within the parish there is a wharf, communicating with the river, where goods, to the amount assessed, are annually landed. It must be taken, therefore, that the rate was made upon *all* those tonnage dues. It is also stated, that part of the navigation lies in other parishes, in the passage through which the tonnage dues arise,

† 13 R. R. 333 (14 East, 609).

as well as for the passage through the part of the river which lies within the parish. Now, if the rate on the tonnage dues be, in fact, a rate on the rateable property, that is, on the whole part of the navigation, in *respect of which those dues are payable, it must be considered as a rate upon the profits arising, not only from that part of the navigation which is within the parish, but from that also which is not within the parish. The objection, therefore, is not merely to the quantum, but to the rate itself, viz. that it is a rate upon property without, as well as within the parish. I think, therefore, that this rate is bad, and that the order of Sessions must be quashed.

THE KING
v.
MILTON.

[*120]

BEST, J. :

I am of the same opinion. It is now clearly established, that tolls *per se* are not rateable. The only mode by which the tolls of a canal become rateable is by rating the land itself, or that part of the land occupied by the canal, which is locally situate within the parish ; the tolls then are the profits arising from that part of the land ; and the statute of Elizabeth authorises the rating of such property locally situate in the parish ; but it does not authorise the rating of property not situate within the parish. I think that the rate here is upon property partly within and partly without the parish, and that it is, therefore, bad ; and that being so, I think the order of Sessions ought to be quashed.

Peake then applied to the Court to amend the rate according to the provisions of 41 Geo. III. c. 23, s. 1.

But the Court thought that that Act was confined to the quarter sessions ; and that this Court had no power given to them to amend a poor-rate. They, therefore, quashed the order of Sessions, but not the rate ; leaving that to be amended by the Sessions.

Order of Sessions quashed.

1819.
Nov. 8.
[135]

FOX, ADMINISTRATOR OF MARY FISH, DECEASED *v.*
FISHER AND ANOTHER, ASSIGNEES OF THOMAS FISH,
A BANKRUPT.

(3 Barn. & Ald. 135—137.)

Where a person, entitled to take out letters of administration, neglected to do so, but remained in possession of the goods of the intestate, and being so in possession, became a bankrupt, and a creditor of the intestate afterwards took out letters of administration, and claimed the goods from the assignees: Held, that these goods were within 21 Jac. c. 19,† being property in the possession, order, and disposition of the bankrupt, with the consent of the true owner, and that the assignees were therefore entitled to them.

TROVER for household furniture. Plea, general issue. At the trial at the last Summer Assizes for the county of Dorset, before Graham, B. the following facts appeared: Mary Fish kept an inn at Bridport, and having died intestate in 1807, Thomas Fish, her son, took possession of the inn and all its furniture, &c. which he continued to carry on for his own profit till February, 1819, when he became bankrupt, and the defendants, as his assignees, took possession of the goods and sold them. T. Fish never took out letters of administration to his mother's effects. In 1806 Mary Fish became bound as surety in a bond for 400*l.* to Sir Evan Nepean, and the bond having been forfeited, the plaintiff, as agent of Sir E. N., took out letters of administration to Mary Fish, on the 19th May, 1819, and claimed the property in that character. At the time of the death of Mary Fish in 1807, she left two sons, Thomas and William, surviving her; but William died on the 24th December, 1818, previously to the bankruptcy of Thomas. The learned Judge, at the trial, was of opinion that this case fell within 21 Jac. c. 19,† as being property by the consent of the true owner, in the possession, order, and disposition of the bankrupt, and directed a nonsuit. And now

[*136] *Pell*, Serjt. moved for a rule *nisi* to set aside the nonsuit, and to enter a verdict for the plaintiff for the *amount of the goods which had been ascertained at the trial. He contended that, in this case, there was no true owner who could give such

† Repealed 6 Geo. IV. c. 16, s. 1: see now the Bankruptcy Act, 1883, s. 44 (iii).

FOX
v.
FISHER.

consent as was necessary. The only person who could be considered as filling that character was the ordinary. But he has only a power to convey, and no property vests in him so as to enable him to give consent. The case of *Fairclaim*, on the demise of *Allen v. Little*,† is in point; there it was held, in an action of ejectment, that twenty years' undisturbed possession was not sufficient to bar the action, the party entitled to administration having only become so lately, and having taken out letters of administration within a short period previously to the commencement of the action; yet there it was contended that it was a possession for twenty years with consent of the ordinary. But the Court of Common Pleas held that not to be sufficient.

ABBOTT, Ch. J. :

Here the son was entitled to take out letters of administration to his mother, and if he had so done, he would have vested in himself a complete legal right. Now, a creditor of the mother might either have brought an action against him as executor *de son tort*, or might have cited him before the ecclesiastical Court, to shew cause why the creditor, and not the son, should be constituted administrator. Neither of these things was done, and the son continued in possession of these goods for nearly twelve years. I think, therefore, that these goods were clearly within 21 Jac. c. 19, as being, with the consent of the true owner, in the possession, order, and disposition of the bankrupt. The case cited is distinguishable, because there the person in possession was not entitled to take out letters *of administration; but here the bankrupt was so entitled. I think the nonsuit was right.

[*137]

BAYLEY, J. :

If we were to hold that a possession of this sort could be defeated by administration subsequently taken out, we should make an end of the statute of James. The possession here would naturally induce the creditors to suppose that the goods were the bankrupt's property, and that he had, if necessary,

† In C. P. H. 58 Geo. III.

FOX
v.
FISHER.

taken out the letters of administration, as he was entitled to do. There are cases which shew that where an executor uses goods belonging to a testator as his own, those goods may be seised under an execution against the executor. Here the bankrupt had, for nearly twelve years, possession of these goods, with the consent of all who were entitled to dispute it with him, and that is enough to satisfy the words of the statute.

HOLROYD and BEST, JJ. concurred.

Rule refused.

1819,
Nov. 9.

[142]

MARRIAGE v. LAWRENCE.

(3 Barn. & Ald. 142—144.)

An entry in the public books of a corporation is not evidence for them, unless it be an entry of a public nature.

[*143]

TRESPASS for taking three sacks of wheat. Pleas, the general issue and several justifications, in which the defendant justified as water-bailiff of the borough of Malden, in the county of Essex, and the question was, as to the right of the corporation of that place to certain tolls. At the trial before Garrow, B. at the last assizes for the county of Essex, the defendant, in support of his case, offered in evidence an entry from the books of the corporation, dated 18th year of Hen. VIII. entitled "Malden, Curia Electionis officiariorum ibidem tenta die Veneris primo post festum Epiphanie domini anno R. Henrici 8, 18mo." The entry was to the following effect: It stated that two ships, loaded with coal, had, on the 17th June preceding, arrived within the liberties of the borough; and that the master had, without any licence from the bailiffs of the borough, and without paying *any fine, delivered certain chaldrons of the coal, and, after having been warned of this infringement of the rights of the borough, had proceeded to finish the delivery of their cargo; upon which the bailiff and council of the borough assembled in the Motehall, on the 23rd June, and after consulting the charter of the corporation, resolved to seize the ships. The ships having been seized, their masters, William Blocksman and John Styngatt,

afterwards came and admitted their offence, and submitted themselves to the bailiffs. It then stated a fine of 40*s.* imposed by the bailiffs, of which 36*s.* was remitted, and 4*s.* paid. The entry was signed P. Goldbourne, *clericus burgi prædicti*. The books in which this entry was found were the public books of the corporation, and contained the records, &c. of their sessions, which, by the charter of the borough, they were entitled to hold. The learned Judge rejected the evidence, and the plaintiff obtained a verdict.

Taddy, Serjt. now moved for a new trial, upon the ground of the rejection of this evidence. The books were of a public nature, and were, therefore, receivable in evidence. It may be admitted, that a corporation is, as to its private rights, in the same situation as any individual. But this entry is a record of a public transaction, in which a fine has been imposed for a breach of duty; and it is found in the corporation books, in which all their public transactions are recorded, and where the account of what takes place at their sessions is to be found. Books of this sort were considered as evidence in *The Mayor of Hull v. *Horner*;† and in *Viner's Abridgment*, vol. xii. p. 90, placitum 16, it is held, that the common books of a corporation are evidence, in regard they contain a register of their public transactions; and for this, the case of *Thetford*‡ is cited, and *Rex v. Mothersell*§ is to the same effect.

[*144]

ABBOTT, Ch. J. :

It seems to me that this evidence was rightly rejected. This was no more than a minute made by a party in his own memorandum-book, and it was, in fact, making evidence for himself. It is said these were public books in which this entry was found; but they were not public books for all purposes. If this entry had been of a public nature, it would have been different; but this not being so, the rules of evidence require that it should not be received.

BAYLEY, J. :

This falls within the rule of evidence which prohibits a party

† Cowp. 102.

‡ K. B. East. Term. 4 Geo. I.

§ 1 Str. 93.

MARRIAGE from making evidence for himself. If a corporation enter their
v.
LAWRENCE. own private business in the public court-book, that circumstance will not alter the nature of the entry; for if the entry apply to private transactions alone, it will still fall within the rule applicable to private books, which cannot be given in evidence for the party to whom they belong.

HOLROYD, J.:

The book in which the entry is made can make no difference, for it will not make the entry of a public nature because it is found in a public book; and if it be of a private nature, it is not receivable in evidence.

BEST, J. concurred.

Rule refused.

1819.
 Nov. 10.

DOE, ON THE DEMISE OF HOWSON *v.* WATERTON.

(3 Barn. & Ald. 149—152.)

[149]

A conveyance of copyhold lands to charitable uses, in the lifetime of the party, is within 9 Geo. II. c. 36,† and therefore must be made with the formalities required by that Act. The Court will not, even after a long and undisturbed enjoyment, presume a bargain, and sale, and enrolment of the same in Chancery: Quære, If it would be sufficient, in the case of copyhold, to declare the uses by a deed, conformably to 9 Geo. II. c. 36, and to cause such deed to be enrolled in Chancery.

EJECTMENT. The case was tried at the last Summer Assizes for the county of York before Wood, B. The following facts appeared: Robert Yoward, being seised of the premises, which were copyhold of the manor of Rothwell, surrendered them by writing dated 19th July, 1743, into the hands of the lord of the manor, "To the use of certain persons therein named, their heirs and assigns for ever; in trust, nevertheless, to and for the use, benefit, and habitation of the poor of the town of Rothwell for ever." The trustees were duly admitted at a court holden October 12, 1743. The lessor of the plaintiff was the eldest son

† Now formally repealed, and substantially re-enacted by 51 & 52 Vict. c. 42.—R. C.

of the last surviving trustee, who died in 1786, and he was duly admitted tenant upon the inquisition of the homage upon the like trusts upon 20th October, 1818. No evidence was given to shew when Robert Yoward died. At the trial, *Hullock*, Serjt. for the defendants, objected that this surrender was void by the statute of 9 Geo. II. c. 36, none of its provisions having been complied with, and he cited *Arnold v. Chapman*,† to shew that copyhold lands were within that Act. The learned Judge, being of the same opinion, directed a nonsuit. And now

DOE
v.
WATERTON.

Tindal moved for a new trial :

He contended, that though a devise of copyhold was held to be within the *statute 9 Geo. II. c. 36, in the case of *Arnold v. Chapman* ; yet, in this case, the gift is not by will, but by conveyance in the lifetime of the party, and a conveyance of copyhold is not within the statute. The statute directs that such conveyances shall be made by deed indented, sealed, and delivered twelve months before the death of the party, and enrolled in Chancery within six months of its execution. But a copyhold estate cannot pass by bargain and sale, enrolled, and, therefore, it follows, that it was not included within the Act. And it is not within the mischief intended to be remedied. For a copyhold does not pass by a private conveyance, but by surrender, which is a public act, done openly in the lord's court. But, secondly, the statute does not make void the legal estate, and therefore, as the plaintiff has been admitted, he may recover at law, *Doe dem. Toone v. Copestake*.‡ Supposing, however, that a bargain and sale and an enrolment are necessary, they may, after so long an enjoyment, be presumed to have existed ; *Mayor of Kingston v. Horner*,§ *Rex v. Long Buckby*.|| And, as to the objection, that it did not appear that the surrenderor, in this case, survived for a year after the surrender, it is sufficient to say, that, as it appears he was alive when the surrender took place, the Court will also presume that he continued alive for a twelvemonth afterwards.

[*150]

† 1 Ves. Sen. 108.

‡ 6 East, 328, 331.

§ Cowp. 102.

|| 8 R. R. 595 (7 East, 45).

DOE ABBOTT, Ch. J. :

^{v.}
WATERTON. The case of *Arnold v. Chapman*, which has been cited, is a distinct authority to shew that copyhold, as well as freehold lands, are within the operation of the 9 Geo. II. c. 36. And if [*151] it were perfectly *clear, that it was impossible for the mode of conveyance pointed out by the statute to be adopted in the case of copyhold, the only consequence that would follow would be, that the statute would absolutely prohibit any conveyance of copyhold to charitable uses. But it would, by no means, be a legitimate consequence, that copyhold lands could lawfully be conveyed without the formalities required by that Act. The Act was passed for the sake of public policy and to prevent persons from conveying their lands to charitable uses in a secret manner at or near to the time of their death. It therefore directs the execution in the presence of two witnesses, and the enrolment in Chancery, and makes it necessary that the party should survive for a year. It is said, that in this case, the Court may presume, if necessary, that a bargain and sale, and enrolment have been made. But the cases cited are very distinguishable from this, and no instance can be found, where the Court have presumed that an enrolment has been made. I am, therefore, of opinion, that no such presumption ought to be made, and, that there are no sufficient grounds for granting this rule.

BAYLEY, J. :

I am of the same opinion. The statute meant to provide that a party who conveyed his lands to charitable uses, should, at the time of such conveyance, be of full understanding, and that the conveyance should possess the greatest possible notoriety. It is said, that by a surrender of copyhold openly in the lord's court, this will be effected. But that is not so; for, though the surrender, itself, be notorious, yet the uses to which the lands are surrendered, need not appear on the rolls of the Court. [*152] Admitting that there *could not be an operative bargain and sale in this case, still the parties might, at least, have attained the object of notoriety, by executing a deed declaring the uses of the surrender, in the mode required by the statute, and having it enrolled in Chancery; but that has not been done in this case.

As to presuming an enrolment, if it had appeared, that the rolls of Chancery had been searched, and a chasm had been discovered about the period of this surrender, it might have been different. At present, there is no evidence, upon which such presumption can be founded.

DOM
v.
WATERTON.

HOLROYD, J. :

It appears to me, that copyhold lands are within the mischief intended to be remedied by the statute 9 Geo. II. c. 36 ; and, if so, they fall within the rule of law, which says, that cases within the mischief of a statute shall be held to be included in the general words of it. And, although a copyhold must pass by surrender, and not by bargain and sale, yet, it is clear that the uses of the surrender may be declared by deed indented and enrolled. That, however, has not been done in this case.

BEST, J. concurred.

Rule refused.

BADGER v. FORD.†

(3 Barn. & Ald. 153—155.)

1819.
Nov. 11.

[153]

A copyhold tenement, to which a right of common was annexed, having vested in the lord by forfeiture, he re-granted it as a copyhold, with the appurtenances : Held, that having always continued demisable, while in the hands of the lord, it was a customary tenement, and, as such, was still entitled to right of common : Held, secondly, that a custom for the lord to grant leases of the waste of the manor, without restriction, is bad in point of law.

DECLARATION stated, that plaintiff was lawfully possessed of a messuage or tenement, and sixteen acres of land, with the appurtenances, situate in the parish of Dagenham, in the county of Essex, and, by reason thereof, was entitled to have common for all his commonable cattle, levant and couchant, upon his messuage and land, on a common called Bentry Heath, situate in the parish aforesaid, every year, at all times of the year, as to the messuage and lands, with the appurtenances belonging ; yet, that the defendant, well knowing, &c. built upon the said common, and inclosed the same, &c. &c. Plea, not guilty. At

† Cited by MALINS, V.C. *Wakefield* 613, 640 (on appeal, L. R. 4 H. L. v. *Duke of Buccleuch*, (1867) L. R. 4 Eq. 377).

BADGER
v.
FORD.

the trial before GARROW, B. at the last Assizes for the county of Essex, it appeared that the messuage and land, in respect of which the right of common was claimed, had, about fifty years ago, vested in the lord by forfeiture, and that he re-granted the same as a copyhold, with its appurtenances, to have and to hold, according to the custom of the manor. It also appeared, that for upwards of 150 years, the lord had been in the habit of granting leases of parcels of the waste of the manor, under which inclosures were made; and that, under similar leases, the whole of the common in question was inclosed in the year 1810. There was no other waste upon the manor upon which the commoners could depasture their cattle, at all times of the year, although they turned their cattle on the King's forest during all but the fence months. It was *contended at the trial, first, that the tenement in respect of which the action was brought, having vested in the lord by forfeiture, the right of common became extinguished, and the re-grant of it as a copyhold tenement, *cum pertinentiis*, did not re-create the right of common; and, secondly, that the circumstance of the lord having, at all times, granted leases of parcels of the waste, raised an implication that such a power was reserved to him at the time of the original grant. The learned Judge directed the jury to find a verdict for the plaintiff, with liberty for the defendant to move to enter a nonsuit upon both these points. And now,

[*154]

Marryat moved accordingly; and he contended, first, that the copyhold, to which the right of common was annexed, having itself become extinguished, in consequence of the customary estate having vested in the lord by forfeiture, the right of common was also destroyed; and he cited *Massam v. Hunter*.† There, a copyhold to which a right of common was annexed, being enfranchised by the lord, had become extinguished, and the lord granted it in fee, *cum pertinentiis*; and it was there held, that this gave no right of common, for the common was gained by custom, and annexed to the customary estate, and was therefore lost with it; common, of its own nature, not being incident to a copyhold estate, but a collateral incident gained by

† Yelv. 189.

usage. Secondly, admitting the plaintiff to have a sufficient estate to entitle him to maintain this action, still, the usage which has existed for 150 years for the lord to grant parcels of the waste, *is sufficient to raise a presumption that the lord reserved the power to himself at the time of the original grant.

BADGER
v.
FORD.

[*155]

ABBOTT, Ch. J. :

When a copyhold tenement is seised into the hands of the lord, it does not therefore lose its right of common ; for that right is annexed to all customary tenements, demised or demisable by copy of court-roll ; and while the estate remains in the lord, it continues demisable. If, indeed, the lord grants the fee to a copyholder, it never can again become a copyhold estate, for it ceases to be demisable by copy of court-roll. In this case, if the lord had brought an action against the plaintiff for turning on his cattle, there can be no doubt that he might have pleaded that this was a customary tenement, demisable by copy of court-roll ; and that, by custom of the manor, all such tenements had a right of common. As to the second point, I think it is too much to suppose a reservation of a power by the lord, at the time of the original grant, the effect of which would be to enable him to annihilate the right of common altogether. Such a custom cannot exist. I am therefore of opinion that there should be no new trial.

Rule refused.

THE KING v. RICHARD CARLILE.

(3 Barn. & Ald. 161—171.)

The statute 9 & 10 Will. III. c. 32,† has not altered the common law as to the offence of blasphemy, but has given a cumulative punishment. It is, therefore, still an offence at the common law to publish a blasphemous libel.

1819.
Nov. 13.
[161]

THE defendant had been convicted, upon an information filed against him by the *Attorney-General* for a blasphemous libel. The information was precisely similar to the indictment in the case of *The King v. Williams*, Howell's State Trials, vol. xxvi. p. 656. And being now brought up for judgment,

† Repealed in part by 53 Geo. III. c. 160, s. 2.

THE KING
v.
CARLILE.

Denman moved in arrest of judgment :

[*162]

The charge in this information is of an offence at the common law ; but the 9 & 10 Will. III. c. 32, must be considered as having repealed the common law in this respect. It may be laid down that where a statute prescribes a particular mode of proceeding, and affixes a particular punishment to the offence, there, unless there be an express saving of the common law, the only mode of proceeding is upon the statute. In the 5 Eliz. c. 9, there is an express saving of the common law as to perjury. And the 5 & 6 Ed. VI. c. 14, is to the same effect ; for, after the passing of that Act until the 12 Geo. III. c. 71, by which it was repealed, it does not appear that forestalling was an offence at common law. Now the statute of 9 & 10 Will. III. c. 32, provides that persons committing the offences there specified, who shall be convicted thereof by the oath of two witnesses shall be subject to certain disabilities, and punished in a particular manner, over which the Judges have no discretion. Now if, after that statute, it remained an offence at common law, the discretion as to punishment *would be still in existence, although that Act had provided the contrary. Besides, certain privileges are given by the Act to defendants, such as the necessity for two witnesses, and information within four days, and a power of recantation. Now of these the defendant would be deprived, if it were competent totally to disregard the statute, and to proceed at common law. It has undoubtedly been determined that a blasphemous libel is an offence at common law. But *Taylor's* case,† where that was laid down, was decided before the statute. And, in the cases since the statute, viz., *Rex v. Hall*,‡ *Rex v. Woolston*,§ *Rex v. Williams*,|| and *Rex v. Eaton*,¶ it does not appear that this objection was taken and overruled.

(HOLROYD, J. : In the report of *Rex v. Woolston*, given more fully in Fitzgibbon, p. 64, you will find that the objection was taken, and expressly overruled.)

† 1 Vent. 293 ; 3 Keb. 607.

‡ *Strange*, 416.

§ *Strange*, 834.

|| How. St. Tr. 26, 653.

¶ Not reported.

It may be fairly doubted whether *Rex v. Woolston* was properly a case within the statute. And if it were not, then *Taylor's* case was an authority to shew that the offence there charged was an offence at common law.

THE KING
v.
CARLILE.

ABBOTT, Ch. J. :

I consider it to be perfectly clear that the 9 & 10 Will. III. c. 32, did not take away the common law punishment for this offence. Its title is "An Act for the more effectual suppressing of Blasphemy and Prophaneness," and the preamble recites the object to be "for the more effectual suppressing of the said detestable crimes." And, for this purpose, it imposes *certain disabilities on persons convicted, which are of a very high and severe nature. But it appears to me that the Legislature intended not to repeal the common law on this subject, but to introduce certain peculiar disabilities as cumulative upon the penalties previously inflicted by the common law. The very severe nature of these disabilities might well induce them to introduce provisions of the nature contained in the second and third sections of the Act. Now I take it to be a general rule, that where there is a misdemeanour at common law, a statute providing a particular punishment for it does not repeal the common law; and the rule laid down by Lord MANSFIELD in *Rex v. Robinson*[†] is this, that where a statute creates a new offence by prohibiting and making unlawful any thing which was lawful before, and appoints a specific remedy against such new offence (not antecedently unlawful) by a particular sanction and particular method of proceeding, that particular method of proceeding must be pursued, and no other. But where the offence was antecedently punishable by a common law proceeding, and a statute prescribes a particular remedy by a summary proceeding, there either method may be pursued, and the prosecutor is at liberty to proceed either at common law or in the method prescribed by the statute; because there the sanction is cumulative, and does not exclude the common law punishment. The present case seems to me clearly to fall within the rule laid down by Lord

[*163]

[†] Burr. 799.

THE KING
 v.
 CARLILE.
 [*164]

MANSFIELD, and the distinction there laid down is, I apprehend, well-founded, and grounded, too, on *good authority. If a statute makes that felony which was a misdemeanour at the common law, we know that the misdemeanour is merged in the felony; and it cannot be proceeded upon as a misdemeanour afterwards; but I believe many instances will be found in which prosecutions at the common law are constantly carried on against certain offences, although there are statutes enacting particular punishments for those offences, and providing that a particular course of proceeding shall be adopted, in order to bring them within their operation. I take the principle to be perfectly clear, and to have been long established; and therefore I am of opinion, that the argument now addressed to us ought not to prevail, and that there is no ground for arresting this judgment.

BAYLEY, J. :

It is always a great satisfaction to find that the point argued before the Court has been already decided, and that seems to me to be the case upon the present occasion; for the rule laid down in *Rex v. Robinson* is directly in point, that where an Act of Parliament does not vary the class and character of an offence, but only directs that it shall be proceeded against and punished in a particular way, the punishment given by the Act is cumulative. If, however, the class and character of an offence be varied; as, for instance, if from a misdemeanour it be made a felony, the case is widely different. Here *Taylor's* case decided that blasphemy was a misdemeanour at common law, and the statute does not make it more than a misdemeanour. The punishment, therefore, given by the Act is cumulative on the punishment at common law. Besides, it appears from the report of *Rex v. *Woolston*, in Fitzgibbon, that this very point was there taken and overruled. I think, therefore, that there is no ground for the present motion.

[*165]

HOLROYD, J. :

I am of the same opinion; and, even if the objection had not been made and overruled in *Rex v. Woolston*, I should have had

no doubt about it. In the case of *Rex v. Lopez*, which was before the Court a few days ago, the indictment was for bribery, and it was laid to be an offence at common law. But no such objection as the present was there taken.

THE KING
v.
CARLILE.

BEST, J. :

It has long been a settled maxim, that neither the provisions of the common or statute law are abrogated but by the express words of an Act of Parliament, or by subsequent enactments, so inconsistent with the previous law as to raise a necessary implication that the Legislature intended it should be altered. To bring into doubt what Judges and learned writers have treated as indisputable, we are referred to 5 Eliz. c. 9, and 5 & 6 Ed. VI. c. 14. The first of these statutes is supposed to contain a clause for continuing the common law proceedings against perjury. The 13th section, which has been alluded to, will be found to have no reference to the common law, or any proceedings upon it, but to a power then vested in the Chancellor and certain other great officers, which the statute calls an absolute power to punish perjury. But this clause was introduced to prevent those Judges, who exercised an unfettered discretion, from inflicting a less punishment than that which this statute denounced. As to the 5 & 6 Ed. VI. c. 14, neither that Act nor any *of the other Acts which were made during the reign of Ed. VI., against regrating and forestalling, were ever considered as abrogating the common law misdemeanour. All the writers on the criminal law considered regrating and forestalling as offences at common law, whilst the statutes were in force, and since the repeal of these laws by 12 Geo. III. c. 71, many persons have been convicted of these offences; although it appears, from the repealing statute, that the Legislature rather intended to stop all prosecutions than to revive the proceeding at the common law. So far from the statute of William containing provisions so inconsistent with the common law, as to operate as a repeal by implication, as far as it applies to the offence of libel, it seems intended to aid the common law. It is called "An Act for the more effectual Suppression of Blasphemy and Prophaneness." It would ill deserve that name if it abrogated the common law, inasmuch as,

[*166]

THE KING
v.
CARLILE.

[*167]

for the first offence, it only operates against those who are in possession of offices, or in expectation of them. The rest of the world might with impunity blaspheme God, and profane the ordinances and institutions of religion, if the common law punishment is put an end to. But the Legislature, in passing this Act, had not the punishment of blasphemy so much in view as the protecting the Government of the country, by preventing infidels from getting into places of trust. In the age of toleration in which that statute passed, neither Churchmen or sectarians wished to protect in their infidelity those who disbelieved the Holy Scriptures. On the contrary, all agreed, that as the system of morals which regulated their conduct was built on these Scriptures, none were to be trusted with offices who shewed they *were under no religious responsibility. This Act is not confined to those who libel religion, but extends to those who, in the most private intercourse by advised conversation, admit that they disbelieve the Scriptures. Both the common law and this statute are necessary; the first to guard the morals of the people; the second for the immediate protection of the Government.

Rule refused.

The defendant was afterwards, for this, and for another blasphemous libel, sentenced to pay a fine of 1,500*l.*; to be imprisoned for three years, and to find sureties for his good behaviour for the term of his life.

1819.
Nov. 13.

[167]

THE KING v. MARY CARLILE.†

(3 Barn. & Ald. 167—170; S. C. 1 Cox C. C.; 1 Chit. 451.)

It is not lawful to publish even a correct account of the proceedings in a court of justice, if such an account contain matter of a scandalous, blasphemous, or indecent nature.

GURNEY, on the first day of this Term, obtained a rule *nisi* against the defendant, who was the wife of the defendant in the

† Followed in *Steele v. Brannan* (1872) L. R. 7 C. P. 261; 268; L. J. M. C. 85.—R. C.

former case, for publishing a libel, entitled “The Mock Trial of Mr. Carlile.” It, however, contained a true and correct account of what took place at the trial at Guildhall. In the course of that trial the defendant had read over, to the jury, the whole of Paine’s “Age of Reason,” which was the book, for the publication of which he was indicted; and he accompanied it by arguments and statements of a most blasphemous and indecent description, the whole of which, together with the book, were republished by the present defendant, as a part of the trial. And the defendant *now shewed cause, in person, upon the ground that it was lawful to publish a correct statement of what actually took place in a court of justice.

THE KING
v.
CARLILE.

[*168]

Gurney and *G. W. Marriott*, in support of the rule, were stopped by the Court.

ABBOTT, Ch. J. :

There can be no doubt in the mind of the Court, or of any person acquainted with the law of the country, that if, in the course of a trial, it becomes necessary, for the purposes of justice, that matters of a defamatory nature should be publicly read, it does not, therefore, follow, that it is competent to any person, under the pretence of publishing that trial, to re-utter that defamatory matter. In the case of *Rex v. Creevey*,† the defendant, a member of Parliament, had made a speech in Parliament, which contained matter of a defamatory nature on some individual, and he afterwards thought fit to publish that speech in a newspaper. Now, his privilege, as a member of Parliament, authorised him to deliver that speech in the House of Parliament; but it did not authorise him to publish even a correct account of that speech in a newspaper, and the judgment of the Court followed upon that publication. The law, I take to be most perfectly clear, and, therefore, this rule must be made absolute.

BAYLEY, J. :

I remember perfectly well the case of *Rex v. Creevey*, and I

† 14 B. R. 427 (1 M. & S. 273).

THE KING
v.
CARLILE.
[*169]

remember perfectly that the case of *Curry v. Walter*,† which has been referred to, was then under the consideration of this Court, and Lord ELLENBOROUGH, *in very strong and expressive words, stated, that that case must be taken with considerable qualifications, and that, whenever it should distinctly come under consideration, he should intimate what his opinion upon that decision was. And the opinion delivered by me then, was to the same effect, and was one which I have entertained for a very long series of years. We are bound, for the purpose of justice, to hear evidence in the course of judicial proceedings, the publication of which, at any distant period of time, or at any time afterwards, may have the effect of an utter subversion of the morals and religion of the people. The first time I had occasion to consider this subject was in the case of some trials for adultery. It very often happens, that, for the purposes of justice, our ears may be shocked with extremely offensive and indelicate evidence. But, though we are bound, in a court of justice, to hear it, other persons are not at liberty, afterwards, to circulate it at the risk of those effects, which, in the minds of the young and unwary, such evidence may be calculated to produce. I am satisfied, that whenever that point has been under the consideration of this Court, it has always been viewed, and must, invariably, be viewed in the same way. With respect to what has been said, as to the going on to publish this account, it is right that it should be known, not only that the party who originally prints, but that every person who utters, who sells, who gives, or who lends a copy of an offensive publication to any other person will be liable to be prosecuted as a publisher, and it will be no excuse for him, that it was a faithful representation of that which *a court of justice, in the discharge of its duty, is bound to hear.

[*170]

HOLROYD, J. :

The case of *Rex v. Creevey* was not the first case in which it was determined that it is libellous to publish, in a newspaper, a correct report of a speech made in Parliament. It had been determined before, in the case of *Rex v. Lord Abingdon*,‡ who

† 4 R. R. 717 (1 Bos. & P. 525).

‡ 5 R. R. 733 (1 Esp. 226).

made a speech in Parliament, reflecting on the character of his solicitor, and then published it in a newspaper; and an information was granted against him for that offence. He insisted on his right to publish it, but the Court gave their opinion that, although he had a right to express that in Parliament, he had no right to publish it out of Parliament and to circulate it, as it contained scandalous reflections on an individual.

THE KING
v.
CARLILE.

BEST, J.:

In deciding in this case, it is not necessary to touch the case of *Curry v. Walter*, because that case went on this principle, that it was a fair report of that which passed. It is impossible to look at the title of this publication, and say this is a fair or a proper report of the proceedings of the trial of this party. It begins by calling itself the mock trial of that person. No man can be so absurd as to suppose that he brings himself within the protection of any case which has decided that it is lawful to publish the proceedings of a Court of Justice, who, in the very first line of his publication, libels the Court in which that verdict has been pronounced. But, I think it right, on this occasion, to *express my opinion of the case of *Curry v. Walter*; I think it is certainly lawful to publish the proceedings of courts of justice, but, when I say that, it must be taken with this qualification, that what is contained in the publication must be neither defamatory of an individual, tending to excite disaffection, nor calculated to offend the morals of the people: for, if it contains that which is calculated to produce any of those effects, instead of disseminating useful knowledge, it will produce great mischief. When I say, therefore, that the proceedings in courts of justice may be published, I do not give my sanction to the authority of that case of *Curry v. Walter*, without imposing these conditions. I hope, considering the case and considering the situation of this party, it will be enough, that the law of the land is known upon this subject, and that any further sale of these publications will be stopped; and, if that be the case, I have no doubt, considering in whose hands this prosecution is placed, that vindictive measures will not be had recourse to.

[*171]

Rule absolute.

1819.
Nov. 15.

[179]

CANNAN AND ANOTHER v. BRYCE.†

(3 Barn. & Ald. 179—186.)

Money lent, and applied by the borrower for the express purpose of settling losses on illegal stock-jobbing transactions, to which the lender was no party, cannot be recovered back by him.

ASSUMPSIT for money had and received, &c. Plea, general issue. At the trial before Abbott, Ch. J., at the London sittings after last Hilary Term, the jury found a verdict for the plaintiffs, subject to the opinion of the Court on the following case:

The plaintiffs are assignees of James Amos and Charles Sutherland, under a commission of bankrupt, issued against them on the 9th February, 1816. The defendant is a lieutenant in the service of the East India Company. Amos and Sutherland were merchants in partnership, trading under the firm of James Amos & Co. On the 1st of March, 1814, Amos, without the knowledge of Sutherland, entered into an illegal *stock-jobbing transaction by which he sustained a heavy loss. It was expressly found by the jury, that the defendant was not a partner in such stock-jobbing transaction. Amos was unable to pay the loss, either with his own private funds or with those of the partnership. The defendant lent the produce of 5,000*l.* 4 per cent. consols, for the purpose of paying such loss, and it was applied for that purpose. In consideration of this money so lent, Sutherland joined Amos in a bond to the defendant, which bond, by some mistake, had no condition annexed. In consequence of this it was afterwards cancelled, and another bond, in the penal sum of 7,000*l.*, was executed between the same parties on the 10th March, 1815. The condition of this bond was, “to replace the stock on or before the 18th September then next, and in the meantime to pay the dividends.” The stock was not transferred in pursuance of the condition of this bond; and the firm of Amos & Co. became very much embarrassed before the 18th

† The same principle is assumed in *Fisher v. Bridges* (1854) 3 E. & B. 642; 23 L. J. Q. B. 276; and followed in *Pearce v. Brooks* (1865) L. R. 1 Ex. 213; 35 L. J. Ex. 134; *Taylor*

v. Chester (1869) L. R. 4 Q. B. 309; 38 L. J. Q. B. 225, *Scott v. Brown* (C. A.), '92, 2 Q. B. 724; 61 L. J. Q. B. 738.—R. C.

CANNAN
v.
BRYCE.

September, 1815, and Sutherland having committed an act of bankruptcy on the 27th August preceding, went to America, and remained there till after the bankruptcy of Amos. During his absence Amos had the sole management of the business. Amos afterwards executed to the defendant, at his request, three several deeds of assignment of three several cargoes; the two first of which had been shipped on account of Sutherland and Amos, and the third on account of Amos alone. These deeds were executed by Amos only. On the 17th of January, 1816, Amos committed an act of bankruptcy, and on the 9th February following a joint commission issued against Amos and Sutherland. In April, 1817, the defendant received sums of money on account of the *proceeds of each of the three several cargoes mentioned in the deeds of assignment. The sums received did not, however, amount to the debt due from Amos and Sutherland to the defendant.

[*181]

The case was argued by *J. Evans* for the plaintiff and *Oldnall Russell* for the defendant. * * *

Cur. adv. vult.

[182]

ABBOTT, Ch. J. now delivered the judgment of the Court :

This case was lately argued before us at Serjeants'-Inn Hall. On the part of the plaintiffs it was contended, that this loan being made for the purpose of enabling Amos to pay or compound differences upon illegal stock-jobbing transactions, was in itself illegal, and, consequently, that all securities given for repayment *of the loan were void, and the plaintiffs, therefore, entitled to recover the money received by the defendant in virtue of the assignments, after the acts of bankruptcy of Sutherland and Amos. On the part of the defendant it was contended, that as he was not a party to the illegal transaction, the loan was not illegal, and the securities, therefore, available in law. Another point was made upon the effect of the assignments executed, under the circumstances stated, by Amos alone. Upon this point it is only necessary to observe, that, admitting it to be competent to one partner, after an act of bankruptcy committed by another, to dispose of their partnership property in discharge

[*183]

CANNAN
v.
BRYCE.

of legal demands upon the partnership; yet it is not competent for him to do so in discharge of a demand to which the partners are not by law liable; and we think the partners were not liable in the present case, because we think the loan was illegal, and the securities void. The case was very fully and ably argued, and all the authorities bearing upon it, on one side and the other, were quoted and discussed in such a manner that it is not necessary to notice many of them with any particularity. The authorities principally in favour of the defendant are those of *Faikney v. Reynous* and another,[†] and *Petrie v. Hannay*.[‡] The propriety, however, of these decisions has been questioned in the several subsequent cases that were quoted on the part of the plaintiff; and the distinction taken in the former of them between *malum prohibitum* and *malum in se* was expressly disallowed in the case of *Aubert v. Maze*.[§] Indeed, we think no such distinction can be allowed in a court of law; the Court is bound, in the administration of the law, to *consider every act to be unlawful, which the law has prohibited to be done. The statute upon which the objection to the loan in this case arises, viz. the 7 Geo. II. c. 8,^{||} was founded upon public policy, to prevent, according to the language of the preamble, “the pernicious and destructive practice of stock-jobbing, whereby many of his Majesty’s subjects are diverted from pursuing their lawful trades and vocations, to the utter ruin of themselves and families, to the great discouragement of industry, and to the manifest detriment of trade and commerce.” By the 5th section, upon which this case more particularly depends, it is enacted, “That no money or other consideration shall be voluntarily given, paid, had, or received for the compounding, satisfying, or making up any difference for not transferring any public stock, or not performing any contract or agreement stipulated to be performed; but that every such contract and agreement shall be specifically performed: and all and every person, who shall voluntarily compound, make up, pay, satisfy, take, or receive such difference-money, &c. shall forfeit the sum of 100*l*.” So that the act of paying or receiving is prohibited absolutely, and those who pay,

[†] 4 Burr. 2069.

[‡] 3 T. B. 418.

[§] 5 R. R. 624 (2 Bos. & P. 371).

^{||} Repealed, 23 & 24 Vict. c. 28.

[*184]

and those who receive, are both placed *in pari delicto*. And this statute differs from the statute against gaming, 9 Anne, c. 14; for the latter contains no prohibition against the payment of money lost at play; though it enables the loser to recover back his money within a limited time, and in default of suit by him, enables any person to recover the money and treble the value within a further limited time. Then as the statute in question has absolutely prohibited the payment of money for compounding differences, it is impossible to *say that the making such payment is not an unlawful act; and if it be unlawful in one man to pay, how can it be lawful for another to furnish him with the means of payment? It will be recollected that I am speaking of a case wherein the means were furnished with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object. And we think the present case cannot be distinguished in principle from that of the druggist who sold to a brewer, for the purpose of being mixed with beer, certain drugs, which the latter was prohibited by an Act of Parliament from mixing with beer. I allude to the case of *Langton and others v. Hughes* and another,† wherein it was decided, that the druggist could not recover the price of the drugs sold for that unlawful purpose. And if the defendant acted unlawfully in lending his money to the bankrupts, he could not have sued them for recovery of payment; because no suit can be maintained upon an unlawful act: and if recovery could not be enforced at law upon the contract of lending, neither could recovery be enforced upon a bond given for the performance of that contract; the bond was not less void than the contract, and if the bond was void, the assignments mentioned in the case, which were only in furtherance of the bond, and which were made by one of the partners after an act of bankruptcy committed by the other, cannot give to the defendants a right to retain the proceeds of the goods against the plaintiffs, who claim under a commission against both the partners for the benefit of the lawful creditors of both, such commission being grounded upon acts of bankruptcy committed by each of them before any of the proceeds of the goods had

CANNAN
T.
BRYCE.

[*185]

† 14 R. R. 531 (1 M. & S. 593).

CANNAN
v.
BRYCE.
[*186]

come to the hands of the defendant in pursuance *of the assignments. For these reasons, we are of opinion, that the plaintiffs are entitled to recover the whole of the proceeds of the cargoes and investments mentioned in the case. And the *postea* must be delivered to them.

Judgment for the plaintiffs.

1819.
Nov. 15.
[193]

THE KING v. TIPPETT.

(3 Barn. & Ald. 193—203.)

A prescriptive right to a public towing-path, on the banks of a navigable tide-river, is not destroyed in consequence of that part of the river adjoining the towing-path having been converted by Act of Parliament into a floating harbour, although the towing-path was thereby subject to be used at all times of the tide; whereas, before, it was only used at those times when the tide was sufficiently high for the purposes of navigation: Held, secondly, that the prescription was not destroyed by a clause in the Act of Parliament, whereby the undertakers of the work were authorised to make a towing-path over land comprising the towing-path in question, on paying a compensation to the owner of the soil, the effect of that being only to give him a compensation for any injury he may sustain by enlarging the then towing-path, or otherwise.

INDICTMENT against the defendant for a nuisance, charging him, in the first count, with having, on 1st April, 1817, unlawfully obstructed a public way in the parish of St. Augustine, in the city and county of Bristol, on the side of a floating harbour there; which way had been and ought to be used by all the King's subjects going with vessels on the said floating harbour to pass and repass over for the purpose of hauling and towing their vessels along the floating harbour. The third count stated, that after the passing of an Act of the 49 Geo. III. entitled "An Act for improving and rendering more commodious the port and harbour of Bristol," and before the nuisance committed by the defendant, the Bristol Dock Company did, in pursuance of the Act, make and convert a part of the then course of a navigable river, called the Avon, into a floating harbour, and make a new course and channel for the Avon in lieu of that part of the course converted into a floating harbour, and had continually,

THE KING
v.
TIPPETT.

[*194]

from thence, maintained the floating harbour and the new course of the river, and that from time whereof the memory of man was not to the contrary, until the obstruction thereafter mentioned, there had been, and still ought *to be a public towing-path, on the bank and edge of the old course of the old river, from the mouth of a river called the Froome, unto the Lime-kiln Dock, in the said city, until the course of the Avon was so changed as aforesaid, and, since that time, on the side and edge of the floating harbour used for all the King's subjects passing and repassing with their vessels, upon and along the old course of the Avon and the floating harbour respectively, to pass and repass along the towing-path, at all times, at their free will and pleasure, for the hauling and towing of their vessels passing along the old course of the Avon and the floating harbour respectively. The count then stated the obstruction as in the first count. The defendant pleaded not guilty. The indictment was tried before Burrough, J. at the assizes for the county of Somerset, when the jury found the defendant guilty, subject to the opinion of this Court on the following case :

The dean and chapter of the cathedral church of Bristol were the proprietors of a boat-yard, part of Cannon's Marsh, in the parish of St. Augustine in that city, adjoining to water which formerly constituted a part of the river Avon, but which, under the 43 Geo. III., had been converted into a floating harbour, and a new course had been cut in lieu thereof, in which new course the Avon now flowed. This boat-yard was demised by the dean and chapter to one Sidenham Feast, by whom it was underlet to the defendant, who, at the time of the obstruction, was in possession of it. The boat-yard was formerly in the occupation of one Mansfield, boat-builder. From time immemorial, until the passing of the Acts thereafter mentioned, there existed a towing-path, and the same was so used, after the passing of *the Acts, over the boat-yard; and mooring posts had been set up and were standing for the purpose of towing and mooring vessels navigating that part of the river. The river had, till then, been a tide-river, and vessels used to be towed up and down the same every tide. By an Act of the 43 Geo. III. the Bristol Dock Company were authorised and re-

[*195]

THE KING
v.
TIPPETT.

quired to make two dams and overfalls across the river Avon at certain places therein mentioned, with entrance-basons, locks, gates, and sluices, so as to make the space of water between such dams a floating harbour, to the constant height of sixteen feet, and to exclude the tide-water, and also to make a new channel for the Avon, from the place where the floating harbour commenced to a certain other place therein mentioned, and also to make a canal with a proper towing-path on the south side, from the Avon at or near Avon-buildings, in the county of Gloucester, to the Avon near the brass works in the parish of St. George, in the same county, and also to make a proper towing-path along the floating harbour, from such cut, and through Temple Meads to the west end thereof. And by the same Act, after reciting that it would be of great public convenience that towing-paths should be maintained on the sides of the Avon, and that the greatest part of the length of such towing-paths might be formed and laid out of waste lands, the company were authorised to make towing-paths along the sides of the Avon, from Chapel Pill and Sea Mill Dock, to Trim Mill and the quays, through the lands mentioned in the schedule thereunto annexed, or in the books of reference. The schedule referred to was entitled "A schedule of lands, along which a towing-path is proposed to be made;" but none of the lands described *in that schedule comprehended the spot in question. The book of reference was entitled "Book containing the names of the owners and occupiers of the property through which the navigation runs," but did not point out any lands as those through which any towing-path was to be made. By the 48 Geo. III. it was enacted, that in case the company should make a towing-path in Cannon's Marsh on land belonging to the dean and chapter, then in the possession of the said Sidenham Feast, as their lessee, such towing-path should not exceed six yards in breadth, to be measured from high-water-mark, and to commence to or from the gate then standing at the west end of Cannon's Marsh aforesaid, and to extend to the corner of a yard in the occupation of Joseph Mansfield, boat-builder, on the east end thereof, and that the compensation for the use of such towing-path should be ascertained in the manner therein speci-

[*196]

fied; the company were not to use the said ground for any other purpose than as a towing-path, and the dean and chapter were not to be prevented from building, upon Cannon's Marsh, any docks, wharfs, &c. or from forming any cuts or canals through such intended towing-path, &c. into any such docks, &c.; in which case the company were to make and repair the necessary draw-bridges, &c. so long as they had the use of the towing-path. In the year 1809, the several works directed by the Acts of Parliament were completed. That part of the river Avon, which lay between the places where the two dams were authorised to be made, was converted into a floating harbour, and a new course formed for the river Avon in lieu of the part which had been so converted. The communication at either end of the floating harbour with the new *course of the river Avon, was kept up by means of entrance-basons and locks formed and constructed as pointed out in the Acts. After the works had been completed, and the partial alterations made in the course of the river Avon, the towing-path and mooring-posts, mentioned in the indictment, continued to be used, until the time of the obstruction by the defendant; and after the towing-path had been obstructed, and the mooring-posts removed, five ships, by reason of such obstruction, sustained damage in passing along the floating harbour, four of them by running foul of other vessels, and one by striking against a bridge.

THE KING
v.
TIPPETT.

[*197]

[After argument, the Court took time for consideration.]

ABBOTT, Ch. J. now delivered the judgment of the Court :

We are of opinion that the Acts of Parliament have not destroyed the prescription, or the right of the public to the towing-path founded thereon. It appears, that the public had enjoyed the use of the towing-path for several years after the passing of the first of these Acts of Parliament, and the conversion of this part of the river into a floating harbour in pursuance thereof. In the argument before us, the case was put, first, upon the general effect of this legislative alteration of the state of the river Avon; and, secondly, upon the effect of the particular clauses in the Acts, and especially the latter Act relating to the

[201]

THE KING
v.
TIPPETT.

power given to the company to make a towing-path, which might extend over the place in question. Upon the first point, it was urged, on behalf of the defendant, that the effect of the alteration of the state of the river would be to cast a greater burthen upon the land in the occupation of the defendant than had previously existed; because, before the alteration, vessels could be moved only at certain times of the tide, which would include only a few hours of the natural day at any season, and a very small portion during the seasons of neap-tides; whereas, since the alteration, vessels may be moved at any hour in any season. To this it was answered, that the number of vessels to be moved up and down, in the period of a year, would not be greater since the alteration than before; because, even supposing that a greater

[*202] number of vessels should trade to the port of Bristol, yet such barges and vessels as were not destined for that port would, instead of passing the place in question, take their course along the new channel of the river cut under the authority of the Act. Our opinion, however, is not founded upon any calculation of this nature. The purpose for which the path was used continues the same. The public had a right to use the path before the alteration, at all times and seasons when it could be practically used. The right was not limited or restrained by any ordinance of man, and had, in truth, no limit but such as was imposed by the course of nature, which imposes some limit upon the exercise of every human power. If, before the alteration, any person had been sued for using this path, he might very safely have alleged in his defence, that it was a common and public path, used by all the King's subjects for the towing of their vessels every year, at all times of the year: the exception arising out of the natural reflux of the tide need not have been noticed. An allegation that a person has a right to do anything, at all times, at his free will and pleasure, necessarily embodies in itself a tacit exception of those times at which the doing of the thing is rendered impracticable by natural events, whether ordinary or extraordinary. A justification of passing over the land of another, under a public right of way, need not contain an exception of those times at which the way may be rendered impassable by an extraordinary flood, or by that want of

artificial improvement under which many of the highways of the kingdom were formerly impassable by carriages, during some portion of the year. The improvements of modern times have rendered many roads passable at all seasons, which *formerly were not so, and have deprived the owner of the soil of some growth of herbage that he formerly enjoyed. This latter deprivation has, in some instances, been occasioned by the erection of houses along the sides of the way, in as short a space of time as that which was occupied in converting the tide-harbour of Bristol into a floating-harbour. This floating-harbour still is, in effect, part of the river Avon, though greatly improved, and better adapted to navigation. The use made of the place in question is of the same kind now as heretofore, and the public right is of the same kind as formerly ; and we cannot say that the right is lost by those measures, which have expanded its exercise over a greater number of hours than the natural state of the river formerly allowed. The right of the public at large, under the prescription or custom, is a matter perfectly distinct from the rights or powers of the new corporation created by the Legislature.

THE KING
v.
TIPPETT.

[*203]

The clause enabling this corporation to make a towing-path over land, including the place in question, on payment of a compensation, is by no means inconsistent with a pre-existing right in the public to use the place as a towing-path. Its proper effect is only to give to the owner of the soil a compensation for the injury that he may sustain in consequence of any improvement made by the corporation, whether by extending the width of the path or otherwise. The public are not to lose the right formerly enjoyed, such as it was, because certain persons are furnished with an authority to render its exercise more easy and beneficial, which authority they may or may not execute, according to their own pleasure. For these reasons, we think the verdict of guilty must stand.

Judgment for the Crown.

1819.
Nov. 20.

THE KING *v.* GEORGE WILLIAMS, Esq.

(3 Barn. & Ald. 215—220.)

[215]

The Sessions have no jurisdiction, under 55 Geo. III. c. 51, s. 16,† to make a prospective order for a compensation thereafter to be made to the clerk of the peace; and, therefore, where a county-treasurer, in obedience to such an order, made the payment, and that payment was afterwards, by an order of Sessions, allowed in his accounts, the Court of K. B. quashed so much of the order of sessions as allowed that item: Quære, whether, under the 55 Geo. III. c. 51, s. 16,† the Sessions have a power to make any compensation to the clerk of the peace.

At the annual general Sessions of the peace for the county of Lancaster, holden at Preston, on the 25th June, 1818, the Court of Quarter Sessions allowed the treasurer's accounts, on the debtor side of which was the following item: "To the clerk of the peace—his fees on rolls issued in April, July, and October, 1817, and in January, 1818, 35,589*l.* 17*s.* 0*d.*, at 1*s.* per pound, 148*l.* 5*s.* 8*d.*" The order of Sessions having been removed into this Court by *certiorari*, Parke obtained a rule *nisi* for quashing so much of it as related to the above item, on an affidavit, stating, that such allowance had been made, not upon an estimate of the labour of the clerk of the peace, but on a calculation of poundage on the sums estreated by the rolls issued. In answer to this, the affidavits stated an order of Sessions, dated 4th December, 1815, which was as follows: "That the clerk of the peace be allowed one penny in the pound on all sums raised by virtue of the said new assessment, in lieu of his usual fees heretofore taken for making the rates and for the rolls, exclusive of all charges and expences in printing and preparing the said rolls, which he is hereby directed to charge in his annual accounts."

Scarlett and *I. Williams* shewed cause:

The county treasurer was bound to obey the order of Sessions of December, 1815, and he was, therefore, justified in making the payment in question. And if any objection is to be taken

† Repealed by 15 & 16 Vict. c. 81, but substantially re-enacted by s. 12 of that Act.—R. C.

to that order, it ought to have been *removed by *certiorari*, and so brought before the Court. If the Court of Sessions had jurisdiction to make any order for a compensation to the clerk of the peace, it is sufficient; for they have exercised that jurisdiction; and as the order itself is not before the Court, the mode in which the jurisdiction has been exercised is not in question. Now the 55 Geo. III. c. 51, gave a jurisdiction in cases like this to the magistrates; for the 16th section enabled them to make compensation to all their officers, and their jurisdiction was not denied in *Rex v. Houldgrave*;† but there the order was before the Court, and it appeared that the justices had made a vicious computation. Here it is not before the Court; and the Court will not presume that an order not before them is bad. Every presumption should be made in favour of an order of this description. Here the work had been performed at the time of the allowance of the treasurer's accounts, and the Court may fairly presume that the Sessions then estimated its value, and finding that an allowance of one penny per pound on the sum estreated was a proper compensation for the labour done, allowed that sum accordingly. They also cited *Rex v. Inhabitants of Essex*.‡

THE KING
v.
WILLIAMS.
[*216]

Parke, contra:

The 55 Geo. III. c. 51, s. 16, gave no jurisdiction to the magistrates to make a compensation to the clerk of the peace; for the officers enumerated are all of an inferior description; and the general words at the end must be construed with reference to *the officers enumerated. Besides, at all events, the order of December, 1815, was bad on the face of it. For it was a general order, and prospective, and the justices have no power to make a prospective order. If so, the treasurer ought not to have obeyed it. He was then stopped by the Court.

[*217]

ABBOTT, Ch. J.:

This case has come before the Court rather in an imperfect manner. It appears, however, to stand thus: By an order,

† 19 B. R. 332 (1 B. & Ald. 312).

‡ 2 R. R. 470 (4 T. R. 591).

THE KING
v.
WILLIAMS.

[*218]

made June 25th, 1818, the treasurer's accounts for the county of Lancaster were allowed at the annual General Sessions by the magistrates there assembled. That order has been brought up into this Court by *certiorari*, and a motion has been made to quash such part of the order as allows the sum of 148*l.* 5*s.* 8*d.* to the treasurer. That motion is supported by an affidavit, stating that the allowance was made, not upon any calculation of the work done by the clerk of the peace, but by a poundage upon the sums levied under the rate. On the other side, an order of Sessions, dated 4th December, 1815, is produced, by which this poundage was allowed; and, supposing that order to have been made by a competent tribunal, I might perhaps think that that order ought to have been removed into this Court before we could proceed to quash the part of the present order before referred to, inasmuch as the treasurer would be warranted in making such payment, in obedience to the order of December, 1815. But I am of opinion, that the Sessions have no jurisdiction to make a prospective order of this sort for an allowance to the clerk of the peace by way of poundage. And if that order was *made by a tribunal which had no such jurisdiction, the payment by the treasurer was without authority, and ought not to be allowed in his accounts. It has been ingeniously put in argument that the order in 1818, after the work had been done by the clerk of the peace, may be considered as an original order by the Court making him a proportionate allowance for his trouble. But, I think, that it is impossible so to consider it. In the first place, it is not the ordinary course of proceeding to make such an original order at the time of examining the treasurer's accounts. The magistrates, upon that occasion, only examine whether he has properly given credit for the sums received by him, and that the sums stated to be paid by him are properly vouched. In the second place, it is to be observed, that the voucher for this individual payment, which is here returned with the order of Sessions, shews most manifestly, that this sum was paid by virtue of the order of December, 1815. It is impossible, therefore, to consider the order of June, 1818, as an original and substantive order; or, indeed, as any thing else than an order allowing an account expressly founded

on the order of December, 1815, which, it appears, was made by a Court wholly without jurisdiction. I am, therefore, of opinion, that that part of the order of Sessions, making allowance to the clerk of the peace, should be quashed.

THE KING
v.
WILLIAMS.

BAYLEY, J. :

It is not necessary, upon the present occasion, for the Court to decide whether the Sessions, under this Act, have a power to make any compensation to the clerk of the peace. At present, I am not satisfied that the clause relied upon does not give them that *power. For the officers are there enumerated, without any reference to rank, priority, or arrangement in any other respect; and, not being named according to any gradation or rank, it seems to me that the general words at the end are not necessarily restrained so far as to exclude the clerk of the peace. But it seems to me quite clear, that the present order cannot be supported. For the item is this: "To the clerk of the peace; his fees on rolls issued, 35,589*l.* 17*s.*, at one penny per pound, 148*l.* 5*s.* 8*d.*" Now that is *prima facie* an objectionable allowance; for this is not the proper way of remunerating an officer, being according to the quantum of the rates collected, and not according to his trouble. Then that being so, it was incumbent on the treasurer, who had made that payment, to shew some order of Sessions authorizing it; for when his accounts were before the magistrates, they ought only to have allowed such items as were so authorized. Now the only order produced is that of December, 1815. But I am of opinion that the Sessions had no jurisdiction to make such a prospective order, which was to last an indefinite time. The compensations to the officers are to be paid out of the monies levied by any county-rate; and if they are to make a compensation, the magistrates ought to see what the trouble has been, or is likely to be, without any reference to the quantum to be collected under any specific rate. And, unless they can do that, which never can be the case in an order of this description, it is utterly impossible to say that they have a jurisdiction to make any such order. Besides, there is also an insuperable difficulty arising from the circumstance, that no such order can be removed by *certiorari* after six months

[*219]

THE KING ^{v.} WILLIAMS. [*220] have elapsed ; so that unless *within the first six months such an order were removed, it would be binding for ever ; and that, too, upon persons who, at the time when the order was made, were not inhabitants of the county, and so had no opportunity of contesting the question. I think, therefore, that this item in the treasurer's accounts ought to have been disallowed, and that that part of the order of Sessions which allowed it ought to be quashed.

HOLROYD, J. :

I am of the same opinion, that this rule should be made absolute ; and that for the reasons already given by the Court, with which I entirely concur.†

Order of Sessions quashed accordingly.

1819.
Nov. 20.
[220]

THE KING v. THE MARGATE PIER CO.

(3 Barn. & Ald. 220—224.)

A writ of mandamus to a corporation, commanding them to pay a poor's rate, omitted to state that the defendants had no effects upon which a distress could be levied : Held, that this was a fatal objection to the writ, and might be taken after the return, or at any time before the issuing of the peremptory mandamus.‡ Quære, whether, in such a case, a mandamus will lie.

MANDAMUS. The writ stated, that a rate of 1s. 6d. in the pound was duly made on or about the 17th April last, for the relief of the poor of the parish of St. John the Baptist, in the Isle of Thanet, in the county of Kent, in which parish the pier and harbour of Margate are situated ; and that such rate was duly published, and that by it the defendants were rated at the sum of 150l., for and in respect of the pier and toll-houses, &c. erected thereon. It further stated an application to the defendants, and a neglect and refusal to pay the rate ; and concluded by com-

† BEST, J. was in the Bail Court. *mere v. The Queen* (H. L. 1867)
‡ *Secus*, after trial and verdict on L. R. 2 H. L. 419 ; 35 L. J. Q. B. 913.—R. C.
an issue taken upon the return of the mandamus. *Lord Dela-*

manding *payment to be made to the overseers. To this writ the defendants made a special return. When the case came on for argument,

THE KING
v.
THE
MARGATE
PIER CO.
[*221]

Marryat, for the defendants, took two objections to the writ ; first, that the writ did not state that the defendants had no effects on which a distress could be levied, which was the ordinary remedy in case of the non-payment of a poor's rate ; and, secondly, that no mandamus would lie for the non-payment of a poor's rate.

Gurney and Bolland, contra, admitted the first objection to be a fatal one, but contended that it was now too late to be put as an objection ; and they cited *Rex v. The Mayor of York*,† in which it was so expressly laid down by Lord KENYON and BULLER, J. A party who has such an objection is not to wait till after the return has been made, and then to come and take the objection, but he ought to apply in the first instance, and move that the writ should be quashed.

Marryat, in support of the objections :

The case of *Rex v. The Mayor of York* is directly at variance with the older authorities. The case of *Taylor v. The City of Gloucester*,‡ *Rex v. City of Chester*,§ *Rex v. The Overseers of Shepton Mallet*,|| *Rex v. The Mayor of Abingdon*,¶ *Regina v. The Parish of Littleport*,†† *Rex v. Mayor of Tregony*,‡‡ *Rex v. Ward*,§§ *Moore v. Mayor of Hastings*,||| and *Rex v. The College of Physicians*,¶¶ are all authorities to shew that such an objection may be taken after the return ; and in *Rex v. Mayor of Abingdon*, even after the return had been held to be bad in a subsequent Term, exceptions were allowed to be taken to the writ, as appears from the report in Carthew ; and no authority can be found which supports the position relied on by the other

[*222]

† 5 T. R. 74.

‡ 1 Rol. R. 409.

§ 5 Mod. 10.

|| 5 Mod. 420.

¶ 2 Salk. 699 ; 1 Ld. Ray. 559,
S. C. ; Carth. 499.

†† 6 Mod. 97.

‡‡ 8 Mod. 111, 127.

§§ 2 Str. 893.

||| Cas. t. Hard. 353, 362 ; 2 Str.
1070.

¶¶ 5 Burr. 2740.

THE KING
v.
THE
MARGATE
PIER CO.

side, which was only a dictum, and not the principal point decided in the case. On the second objection, he contended that no instance could be produced of a mandamus similar to the present. This is a mandamus to enforce the payment of money. Now the Court have never interposed in cases of a private nature, although a party may have no remedy at law. Suppose an individual living within the local jurisdiction of Wales, sued for a debt, after judgment recovered withdrew himself out of the local jurisdiction, there the plaintiff had no remedy to enforce his judgment; yet no one ever thought of applying for a mandamus in such a case; but a remedy was obliged to be given by Parliament. So, if a man be ordered to pay money by the Sessions, and does not pay it, can a mandamus go to compel him to do so? and in *Emerson v. Lashley*,† after the action had failed, a mandamus might have been applied for, but no such application was made. It has been said that there has been an instance of a mandamus of this sort to the Strand Bridge Company. Now that probably turned upon the particular provisions of the private Act there; for where, as is not *unfrequent in such Acts, no specific remedy at all is given against the company, a mandamus will lie. But where a specific remedy is once given, no mandamus will lie, even after that specific remedy has been by circumstances rendered unavailing. The general proposition is, that a mandamus will only lie where both in law and in fact there is no other remedy given. In *Rex v. Bristow*,‡ it was held that no mandamus could be granted, because the proper remedy was by indictment. And in *Stevens v. Evans* and another,§ DENNISON, J. laid it down as a rule, that where a new statute prescribes a particular remedy, no other remedy can be taken, and that therefore no action would lie for a poor's rate. So here no mandamus ought to go to compel a payment of a poor's rate, the only remedy being by distress and sale of the parties' goods. Suppose an action against a corporation, in which the individuals of it were not personally liable, and the corporation had no property capable of being taken in execution. There is no instance ever heard of in which a mandamus has

† 3 B. R. 370 (2 H. Bl. 248).

§ 2 Burr. 1157.

‡ 3 B. R. 144 (6 T. R. 168).

been applied for to compel the payment of the debt. Yet such cases must have frequently occurred. This is a novel application, the extent of which it is not easy to foresee.

THE KING
v.
THE
MARGATE
PIER CO.

ABBOTT, CH. J. :

I am of opinion that it is not too late now to take an objection to the writ. Suppose an action brought for a false return, if the writ be defective the party bringing the action can never be entitled to judgment. And besides, in a case like this, *where there is no writ of error, the Court will surely, at any time before a peremptory mandamus issues, suffer itself to be informed, and examine whether the writ is so framed as to give them jurisdiction. It is undoubtedly more convenient that such an objection should be taken at first, and that will probably account for the observations of Lord KENYON and BULLER, J. in the case cited.† But the other authorities, shewing that such an objection may at any time be taken, do not seem to have occurred to these learned Judges when those observations were made. Then, as to the objection itself, it appears to me that the ground of such an application as the present is, that there is no other remedy, and therefore it is clear that the writ ought to state that fact distinctly ; if not, it would deprive the defendants of the power of traversing that most material fact, for they are only to answer what is alleged in the writ. I think, therefore, that this is an objection in substance and not in form, and that we ought to quash the writ. That being so, it becomes unnecessary to pronounce a decision on the point, whether any mandamus will lie in the present case.

[*224]

Writ of mandamus quashed.

† *R. v. The Mayor of York*, 5 T. R. 74.

1819.
Nov. 23.

NIAS *v.* ADAMSON AND OTHERS.†

(3 Barn. & Ald. 225—233.)

[225]

Where the assignees of an uncertificated bankrupt, by agreement, for a valuable consideration paid to them by a third person, had left the bankrupt's furniture, &c. in his possession, and afterwards, notwithstanding such agreement, seized the same, it was held, that they were justified in so doing, an uncertificated bankrupt not being entitled to retain any property against his assignees.

TRESPASS for breaking and entering plaintiff's house, and seizing his goods. The defendants pleaded the bankruptcy of the plaintiff. Replication, that the defendants committed the trespass of their own wrong; upon which issue was joined. At the trial, at the last Lent Assizes for Essex, before Park, J., the only question was, whether the seizure of the goods was justifiable. The defendants were acting under the authority of the assignees of the plaintiff, Nias, who became bankrupt in May, 1816, and had not obtained his certificate. It appeared, that at a meeting of creditors under the commission, held pursuant to notice in the "Gazette," for the purpose of assenting to, or dissenting from, the sale of the bankrupt's furniture, and to consider whether it should be by public or private contract, it was at first proposed that the bankrupt's furniture should be given up to him. After some debate, it was finally arranged by the creditors then present (who were, however, not the whole, nor even a majority, in number, of the whole body) that, on the payment of 100*l.* the furniture should be given up. Accordingly, a friend of the bankrupt, Mr. Collinson, advanced that sum, and the bankrupt remained in possession. In January, 1817, the assignees took possession of the furniture, notwithstanding the previous agreement; and, on the 31st January, sold the goods in question, for the seizure of which the action was brought. The learned Judge told the jury, that *though the general principle was quite clear, that the property acquired by a bankrupt between his bankruptcy and certificate belonged to his assignees, yet, that, in his opinion

[*226]

† Distinguished in *Engleback v. Nixon* (1875) L. R. 10 C. P. 645, 653; 44 L. J. C. P. 396; where equitable considerations as between

the trustee of the bankrupt and a creditor dealing with the latter were involved.—R. C.

the peculiar circumstances of this case entitled him to maintain this action, inasmuch as the assignees, having obtained the consent of the creditors called together by advertisement, had here entered into a contract with the bankrupt for the sale of these very goods, and had received the money from a friend of the bankrupt. The jury found a verdict for the plaintiff, damages \$17l. Nolan, in last Easter Term, obtained a rule *nisi* for a new trial, on the ground of a misdirection of the learned Judge, in this respect. And now

NIAS
v.
ADAMSON.

Marryat, Gurney, and Comyn, shewed cause. * * *

Nolan and Montagu, *contrá*. * * *

[227]

Bolland, who was to have argued on the same side, was stopped by the COURT.

[228]

ABBOTT, Ch. J. :

[229]

It is our duty, as a court of law, to decide this case upon legal principles; and it is clear, that by law, an uncertificated bankrupt cannot possess property; for, as soon as it comes to his possession, it vests in his assignees, and may be seized by them. But it is said that this is an excepted case, and that here the assignees are estopped from saying that this property did not belong to the bankrupt. The facts are these: A commission issued against the plaintiff; and, at a meeting of creditors, it was at first proposed to leave the bankrupt in possession of the property in question; but some difficulties having arisen respecting this matter, Collinson, a friend of the bankrupt, proposed to pay 100*l*. in order to induce the creditors to permit the bankrupt to remain in possession; and this, at a meeting of the creditors, was agreed to, and the bankrupt accordingly remained in possession, until he was dispossessed by the assignees. Now, it is said, that if the assignees may do this, it is a fraud upon Collinson. We cannot, however, look, in the present case, at Collinson's rights. It is clear, that the property in the goods was intended to vest in the plaintiff; and, if so, it will go to his assignees, unless they are estopped from setting up such a claim.

NIAS
v.
ADAMSON.

[*230]

Then, how are they so estopped? In order to ascertain that, we must look at the duty they are to perform. They are entrusted with a statutable authority, which is to be executed for the common benefit of the creditors at large, and are not to be guided by the will of any particular body of creditors; and the Court cannot hold that they are estopped, without holding, at the same time, that the acts of a meeting of such creditors will bind those who are absent. It being, therefore, the duty of the *assignees, in their peculiar character, to protect the interest of the absent as well as present creditors, I think that, in this case, they were not estopped from claiming these goods, and that there ought to be a new trial.

BAYLEY, J. :

When this case first came before the Court, the impression on my mind was, that it was unjust for the assignees, who had themselves treated the bankrupt as the vendee of the goods, afterwards to treat him as not being the vendee, and to seize the goods. But I am satisfied that that impression was wrong. An uncertificated bankrupt has no power, by law, of acquiring property for himself; but all the property which he does so acquire passes to his assignees, who may seize it whenever they choose to exercise that right. That is the general rule of law, and the only question raised in this case, is, whether there be any difference where the bankrupt obtains the property from third persons, and where he obtains it from his own assignees; and it is contended, that in the latter case the assignees are estopped from making the claim. But the assignees who represent the individual creditors, cannot be estopped, unless all the creditors be estopped also. For, inasmuch as the creditor can only make his claim through the assignees, an estoppel of the assignees would affect his interest, which the assignees are not competent to bind. If, indeed, all the creditors concurred in the act of the assignees, it might make a difference; but, if that be not so, it seems to me, that the bankrupt can only obtain a defeasible property from the assignees, and that any creditor may put the assignees in motion for the purpose of reclaiming the property *left in the bankrupt's possession. And there is no

[*231]

NIAS
v.
ADAMSON.

hardship in this, for it is clear, that the goods cannot be purchased with money belonging to the bankrupt himself, and if purchased by money belonging to a friend, it is as easy for the friend to buy it, and to have the legal property transferred to him. It is inconsistent with the duty of the assignees to sell the goods for less than their full value to any one, and if they sell them for their full value, it seems to me, that the vendee should be the real person from whom the money comes. I think that, in this case, the bankrupt only acquired a property in these goods, subject to be defeated by the assignees; and, consequently, that this verdict must be set aside.

HOLROYD, J. :

I am of the same opinion, that this action is not maintainable. There is no doubt of the general principle of law, that an uncertificated bankrupt can have no assignable property. But, it is said, that, in this case, the assignees have, themselves, treated him as capable of acquiring property, and that they are estopped from making the present claim, having already received a pecuniary consideration for leaving the bankrupt in possession of the goods. Whether Collinson may or may not maintain an action, or be entitled to relief in equity, for the money advanced by him to the assignees, is not the present question. What we have to determine is, whether an absolute property in these goods passed to the bankrupt. Now, the act of a meeting of particular creditors will not, in such a case as this, bind the creditors at large; and, if so, it is competent for any one of the creditors to compel the assignees to put the law in force, and, if they refuse, to *apply for their removal. As all the creditors, therefore, are not estopped, the bankrupt could only acquire a defeasible property in these goods, which the assignees had consequently a right to reclaim. The present action, therefore, is not maintainable.

[*232]

BEST, J. :

I am of the same opinion. The case of *Coles v. Barrow* † is

† 14 R. R. 658 (4 Taunt. 754).

NIAB
v.
ADAMSON.

[*230]

Then, how are they so estopped? In order to ascertain that, we must look at the duty they are to perform. They are entrusted with a statutable authority, which is to be executed for the common benefit of the creditors at large, and are not to be guided by the will of any particular body of creditors; and the Court cannot hold that they are estopped, without holding, at the same time, that the acts of a meeting of such creditors will bind those who are absent. It being, therefore, the duty of the *assignees, in their peculiar character, to protect the interest of the absent as well as present creditors, I think that, in this case, they were not estopped from claiming these goods, and that there ought to be a new trial.

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NIAS
v.
ADAMSON.

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[*232]

BEST, J. :

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† 14 E. R. 658 (4 Taunt. 754).

NIAS
v.
ADAMSON.

very distinguishable from the present case, inasmuch as there the action was brought to recover from the assignees a recompense for the personal labour of the bankrupt, whereas here it was brought for property belonging to the bankrupt. And besides if Mr. Justice LAWRENCE had continued in the Court of C. P. that decision would probably not have been pronounced. It is not, therefore, entitled to any great weight. The authority of that case is much broken in upon by the case of *Hesse v. Stevenson*; † there Lord ALVANLEY says, “Can there be any doubt that if a bankrupt acquire a large sum of money, and lay it out in land, that the assignees may claim it? They cannot, indeed, take the profits of his daily labour: he must live; but if he accumulate any large sum, it cannot be denied but that the assignees are at liberty to demand it.” Besides, the statute of Eliz. seems to me, in its very terms, to convey away every species of property which the bankrupt has or can, by any means, acquire; and I think we should violate that statute if we were to hold, that it was competent to the bankrupt to bring an action against the assignees for doing their duty by seizing the property in question. If Collinson be aggrieved by this proceeding, he may apply to the Lord Chancellor for relief; but I do not see how the assignees could have done so with effect, in the present case. Upon the whole, I am of opinion that the *property in the present case belonged to the assignees, as trustees for the creditors at large, and that this action is not maintainable. The rule, therefore, for a new trial, must be absolute.

[*233]

Rule absolute.

† 3 Bos. & P. 565, 578.

WOODBRIDGE *v.* SPOONER AND WIFE, EXECUTRIX
OF BANCE.†

(3 Barn. & Ald. 233—236; S. C. 1 Chitty, 661.)

1819.
Nov. 24.
[233]

Where a promissory note, on the face of it, purported to be payable on demand, parol evidence is not admissible to shew, that at the time of making it, it was agreed that it should not be payable till after the decease of the maker.

ACTION on a promissory note, given by the testatrix to plaintiff, for 100*l.* dated 1st September, 1817, payable “on demand, for value received, and his kindness to me.” Plea, general issue. At the trial before Abbott, Ch. J. at the sittings after last Easter Term, the defendant gave in evidence, declarations of the testatrix at the time, that the note was not to be payable till after her death, and that it was to be given in addition to a legacy of 20*l.* left in her will. It appeared, also, that the testatrix was in poor circumstances, and that she was not, altogether, possessed of more than 300*l.* or 400*l.*, and that she lived almost entirely at the plaintiff’s house. *Scarlett*, for the plaintiff, contended, that this evidence ought not to be received. ABBOTT, Ch. J. received the evidence; and being of opinion that it shewed that the note was a testamentary paper, and ought to be so proved, nonsuited the plaintiff, giving him leave to move to enter a verdict for 100*l.*, in case the Court should be of a different opinion. *Scarlett* having in last Trinity Term obtained a rule *nisi* accordingly,

Marryat and *Adams* shewed cause, and contended, that this evidence was admissible. The note was merely evidence of a debt, and the parol testimony proved, that there was no existing debt, but a mere promise of a sum of money after the decease of the testatrix, and the plaintiff could not have recovered upon it in her lifetime. Suppose a deed was delivered as an escrow, or a bill at two months given with an express agreement at the

[234]

† Followed in *Stott v. Fairlamb* L. R. 5 C. P. 37; 39 L. J. C. P. 9; (1883) 52 L. J. Q. B. 420 (reversed, *Bell v. Lord Ingestre* (1848) 12 Q. B. 17; 19 L. J. Q. B. 71.—R. C. 47). And see *Abrey v. Cruz* (1869)

WOODBRIDGE time, that the party should, at the end of two months, be
 T.
 SPOONER. allowed to renew it; may not these circumstances be given in evidence, in case of an action brought on the deed or bill? If so, there was clearly enough to go to the jury, that this note was agreed not to be demandable till after the death of the testatrix. *Tate v. Hilbert* † is an authority to shew, first, that evidence is receivable of what takes place at the time of giving a promissory note; and, secondly, that a promissory note may be the subject of a *donatio mortis causâ*. And *Lawson v. Lawson* ‡ is to the same effect.

Scarlett and Abraham, contra, relied on *Hoare v. Graham*, § and *Free v. Hawkins*.||

ABBOTT, Ch. J. :

[*235] It struck me at the trial, that this was a testamentary promise in the nature of a legacy, and if so, that the plaintiff could not recover at law. I was led to this conclusion, in some degree, by the language of the first count of the declaration, in which *it was stated, that the deceased promised the plaintiff that she would, at her decease, give him 100*l.* more than a legacy of 20*l.*, which she meant to leave him. It is admitted, however, that unless the evidence was properly received, I ought not to have drawn that conclusion; and it seems to me now, that the evidence was not properly receivable. There is no doubt that a proper and sufficient consideration existed for this note; and the evidence does not negative that part of the case. But its object was to shew that a promissory note, which in terms appeared to have been payable on demand, was agreed not to be payable till after the decease of the maker. Now it is contrary to the rules of law to admit extrinsic evidence to shew, that the intention of a party executing a written instrument is different from that apparent on the face of the instrument itself.

BAYLEY, J. :

I am of opinion that this evidence was inadmissible, and that

† 2 R. R. 175 (2 Ves. jun. 111; § 13 R. R. 752 (3 Camp. 57).
 4 Br. C. C. by Eden, 286). || 7 Taunt. 278; 1 Moore, 535.
 ‡ 1 P. Wms. 441.

even if it were admitted, it ought not to prevent the party from recovering. It appears, on the face of the note, to have been given for a sufficient consideration, and it could not have been the intention that the compensation should rest on the ground of a *donatio mortis causâ*, for then it would be revocable, but that it should be secured by a binding instrument. Under these circumstances the note was given; and it seems to me, that it was obligatory on the party making it, and that even if there were a secret understanding, that the note should not be presented for payment until after the decease of the maker, still it would be binding on her executors. Besides, here the note, on the face of it, purports to be payable *on demand, and it would be extremely dangerous to allow a party, who has signed such an instrument, afterwards to say, that it was not so payable. It is a general and useful rule, that no parol evidence is admissible, to contradict that of which there is written evidence; and I think, therefore, that this evidence was not admissible.

WOODBRIDGE
v.
SPOONER.

[*236]

HOLROYD, J. :

I am of the same opinion. This evidence was adduced, not to shew a want of consideration, or that the consideration for the note was illegal, or that it was not delivered to the party to be made use of for his own benefit. The utmost extent to which it could go, was an attempt to prove that the note was not payable, as on the face of it it imported to be. This, therefore, was to contradict the note itself, which, by the rules of law, a party is prohibited from doing. Even if the evidence had been received, I think it would not make a material difference in the result.

BEST, J. :

The parties in this case are bound by a written contract, and it is contrary to the first rules of law to admit parol evidence to vary or contradict it, and the only exception to those rules is where a contract is illegal. I can see no solid ground of distinction between the present case and that of *Free v. Hawkins*.†

† 7 Taunt. 278; 1 Moore, 535.

WOODBRIDGE It is said, that in this case, there is a fraud on the legacy duty.
 v.
 SPOONER. But if this note was not revocable, it could not be a testamentary gift; and if so, there could be no fraud on the legacy duty. I am, therefore, of opinion, that this nonsuit must be set aside, and that the verdict must be entered for the plaintiff.

Judgment for the plaintiff.

1819.
 Nov. 25.
 [237]

RICHARDSON AND OTHERS, ASSIGNEES OF THOMPSON, A BANKRUPT, v. NOURSE AND CHRISTIAN.
 (3 Barn. & Ald. 237—240.)

The Court will not set aside an award on the ground that the arbitrators have decided contrary to law, unless the law be clear upon the subject; and, therefore, where the captain of a ship, in order to pay for repairs, had necessarily sold part of the cargo, at an intermediate port, at a price higher than it would have fetched at the port of destination, and, upon a reference to settle the average loss between the ship-owner and charterers, the arbitrators (who were mercantile men) allowed for the actual value of the goods when sold, and not for the price they would have fetched at the port of destination, the Court refused to set aside the award.

CAMPBELL, on a former day, had obtained a rule to shew cause why the award in this case should not be set aside. The bankrupt was owner of a ship, which was chartered to the defendants for a voyage to the East Indies and back. While returning home with a cargo, partly belonging to the charterer and partly to other shippers, she encountered a hurricane, and was driven into the Mauritius. The captain there necessarily sold some cotton and rice, part of the homeward cargo, belonging to the charterers, to pay for the ship's repairs and necessary disbursements. Other goods were then taken in on freight in place of those so disposed of, and the ship returned safely to the port of London. The goods sold at the Mauritius fetched a better price than they would have fetched had they been delivered here to the charterers. The general average was settled as between the owner of the ship and the different owners of the homeward cargo by an arbitrator, who gave the owner of the ship credit only for such a sum of money, in respect of the goods

sold at the Mauritius, as they would have produced at the ship's arrival in London, deducting freight and charges. Disputes having then arisen between the charterers and the assignees of the ship-owner, who had become bankrupt, respecting the sum for which the charterers were entitled to credit in respect of their goods sold at the *Mauritius, and other matters, there was a general reference to three arbitrators, who, by the award in question, determined that the charterers were entitled to credit for the full amount of the sum which the goods produced at the Mauritius.

RICHARDSON
v.
NOUVESE.

[*238]

[After argument:]

ABBOTT, Ch. J. :

[239]

The general rule in the case of an average loss is, to value the goods at the clear price they would have fetched at the port of destination. Questions of this kind most frequently arise in cases of jettison. In the present instance, the goods have been sold for the necessary repairs of the ship while on the voyage, and have actually fetched a higher price than they would if they had arrived at the port of destination. There is no decided case precisely in point. The possibility even of the goods fetching any price higher than that of the port of destination did not occur to any of the writers whose works have been referred to in the course of the argument. It must be recollected, too, that this was a reference to mercantile men, and they, perhaps, may have decided the question upon mercantile usage. I cannot say that their decision was wrong: for, by holding that the owner of a ship may lose, but that he can never gain by such a sale as this, we shall furnish the strongest possible inducement to him, to take care that all the goods are conveyed to their place of destination. I do not go the length of saying that where arbitrators proceed upon a mistake of a clear principle of law, that the Court will not set aside their award. But I cannot, in this case, say that the arbitrators have decided contrary to any clear, well-established principle of law; and I think, therefore, that this rule should be discharged.

RICHARDSON BAYLEY, J. :

^{v.}
NOURSE.

It does not appear to me that this award is inconsistent with any plain principle of law. If the point had been considered questionable, the arbitrators might have been desired to state the facts upon the face of their award for the opinion of the Court. If the point was not made before the arbitrators, there is no
[*240] *ground for the present application. If the point was made, and the arbitrators declined to state the facts, they have taken upon themselves to decide the question conformably to mercantile usage, and I am not prepared to say that that decision, either upon authority or principle, is clearly wrong. I think, therefore, that this rule should be discharged.

HOLBOYD, J. :

The Court will not set aside an award on the ground merely that an arbitrator is mistaken in a point of law ; but the Court must be clearly satisfied that he would not have made such an award, if he had known what the law was. Now I am by no means certain, in this case, that if the arbitrators had known the law to be what it is contended to be on the part of the plaintiffs, they would have come to a different decision. For there is strong ground for contending that the owner of goods should receive a compensation for the goods sold, according to their highest value. If the master could get money by other means, he had no right to sell ; and if he had sold the goods, the owner ought to be entitled to the actual proceeds. For the owner of the ship, in the event that has happened, ought not to be allowed to make any profit by such sale.

BEST, J. :

When the objection to an award is, that it is contrary to law, that ought to appear very clear to induce the Court to set aside the award. Now it is not necessary here to decide the question, whether the arbitrators have decided contrary to law or not. It is sufficient to say, that that does not clearly appear ; and, therefore, that this rule should be discharged.

Rule discharged.

WILSON, D.D. v. M'MATH.†

(3 Barn. & Ald. 241—244.)

1819.
Nov. 25.

[241]

The Ecclesiastical Court has jurisdiction, *ratione loci*, over the order and proceedings of vestry meetings held in a church; and, therefore, where a rector had libelled a parishioner, in that court, for preventing him from presiding as chairman at a vestry meeting, a prohibition was refused.

GURNEY had obtained a rule *nisi* for a writ of prohibition, to be directed to the Court of Peculiars of the Deanery of the Arches, London, Shoreham, and Croydon, to prohibit it from further holding plea of the matters there depending between these parties. It appeared, from the affidavits, that on the 16th March last, a vestry meeting for the parish of St. Mary Aldermary was held for the purpose of receiving a report of the proceedings in an action of ejectment, brought by the Drapers' Company against the rector and churchwardens of the parish. At this meeting, held in the church, the rector, Dr. Wilson, attended, as well as the defendant, M'Math, and other parishioners. Upon Dr. Wilson proceeding to take the chair, one of the parishioners moved, and it was accordingly carried, that Mr. M'Math should take the chair, upon which Mr. M'Math took the chair at the opposite end of the table to the rector. The rector, after remonstrating in vain, finally left the place, and the business then proceeded. On the 8th May, he instituted the present suit in the Ecclesiastical Court, for disturbing and interrupting him while presiding at a vestry meeting. The defendant was cited to appear, and did appear, and prayed that the rector might exhibit articles. On the 11th November the Ecclesiastical Court were about to give judgment on the admissibility of the articles, according to notice given in the preceding Term, but, on the day preceding, the rule for a prohibition was obtained.

Gaselee and Marriott shewed cause. * * *

[242]

† The proceedings in the Ecclesiastical Court, where the right of the incumbent to preside at the vestry meeting was established, are reported in 3 Phillimore, 67. The law estab-

lished in this case remains unaffected by the Act 56 & 57 Vict. c. 73, except so far as relates to the powers by s. 6 of that Act transferred to the parish council.—R. C

WILSON
c.

M'MATH.

[243]

Gurney and Curwood, in support of the rule. * * *

ABBOTT, CH. J. :

I am of opinion that the Ecclesiastical Court has jurisdiction in this case. For this is a meeting held in a church, and it is most fit that that Court should have authority over the order and proceedings of a meeting held in such a place. That being so, I abstain from giving any opinion as to what ought to be the decision of that Court upon the question, whether the rector has the right of presiding at this meeting. I think, therefore, that this rule should be discharged.

BAYLEY, J. :

I am of the same opinion. In this case, the place of meeting being the church, gives to the Ecclesiastical Court jurisdiction. It may be necessary, for the purpose of preserving order and decency at such an assembly, that the rector, who is also the person to whom the freehold of the church belongs, should preside at it ; and I think the 58 Geo. III. c. 69, s. 2, confirms this view of the case ; for that Act gives a power of electing a chairman only in case of the absence of the rector, vicar, or curate.

[244]

HOLROYD, J. :

I am of the same opinion. The Ecclesiastical Court has jurisdiction *ratione loci*. And it was on that principle that *Wenmouth v. Collins* † was decided.

BEST, J. :

It is not necessary, in this case, to decide whether the rector has the right to preside at vestry meetings ; although I trust that this right, which appears so essential for the preservation of order, will be ultimately found to be in him. All that at present appears is, that the rector has proceeded against the defendant for an alleged impropriety, committed in the church ; and I am clearly of opinion, that that is a matter within the cognizance of the Ecclesiastical Court. I think, therefore, that this rule should be discharged.

Rule discharged, with costs.

† 2 Ld. Ray. 850.

THE KING *v.* FERRAND.

(3 Barn. & Ald. 260—266; S. C. 1 Chitty, 745.)

1819.
Nov. 29.
[260]

A coroner's duty is judicial, and he can only take an inquest *super visum corporis*; and an inquest, in which the jury were not sworn by the coroner himself, and *super visum corporis*, is absolutely void. The Court will not, therefore, after an adjournment by the coroner of such an inquest, grant any mandamus to compel him to proceed in it.

DENMAN, on a former day in this Term, obtained a rule *nisi* for a mandamus to the defendant, who was one of the coroners of the county of Lancaster, to proceed with an inquest holden at Oldham, on the body of John Lees, which had been adjourned from the middle of October last till the 2nd day of December next. It appeared, on shewing cause, that the jury, on the 8th of September last, had been summoned and sworn, *super visum corporis*, by a clerk of the name of Battye, who attended in the coroner's absence; that the inquest was then adjourned for a few days, and that the body was in the meantime buried; that on the coroner's attending in person, the jury were re-sworn, but not *super visum corporis*, and the coroner proceeded, for many days, to examine witnesses. Whilst the inquest was proceeding, the coroner, without being accompanied by the jury, caused the body to be disinterred, and took a view of it. The Court, upon this, suggested that these proceedings, from the first, were void, and if so, that they could not grant a mandamus to compel them to be proceeded in; and *BEST*, J. referred to *Hawkins*, lib. 2, c. 9, s. 24. They then called upon

Denman and *Tindal* to support their rule:

They contended, that though the clerk had no authority whatever to swear the jury, yet that it was enough, since they had been re-sworn by the coroner himself; and that it was not necessary to swear them *super visum corporis*. It is admitted, that both coroner and jury must proceed *super visum corporis*. But here they have so done; for the jury have been properly sworn, and have seen the body, and the coroner has also had a view of it, and it is not essential that the jury and coroner should see it at the same time. Besides, if there be a reasonable ground for

[*261]

THE KING
v.
FERRAND.

doubt, the Court will not decide it now, but leave it to the coroner to make it the subject of his return to the mandamus.

ABBOTT, CH. J. :

If it be perfectly clear that the jury in this case were at first unlawfully assembled, the Court, of course, will not grant a mandamus to proceed with this inquest; for the only result of such a proceeding would be, that the inquest, if proceeded in, would be bad, and the record might be quashed. Now I am of opinion that this proceeding was irregular from its commencement. It is laid down by my Lord HALE,[†] that “when it happens that any person comes to an unnatural death, the township shall give notice thereof to the coroner, otherwise, if the body be interred before he come, the township shall be amerced.” And it appears, that when this notice is given to the coroner, his duty is to issue a precept to the constable to return a competent number of good and lawful men to appear before him, to make an inquisition. When they appear, they are to be sworn, and charged by the coroner, to enquire, upon the view of the body, how the party came by his death. It is said by Hawkins,[‡] that the “coroner can take inquisition of death only upon view of the

[*262] body, and not otherwise. Therefore, *if the body be interred before he come, he must dig it up, and this he may do lawfully within any convenient time, as within fourteen days.” In addition to this, there is the 4 Ed. I. stat. 2, De Officio Coronatoris, in which it is stated to be the duty of the coroners “quod accedant ad occisos,” and afterwards, “si quis autem talium occisus fuerit, in campis vel boscis et ibi inveniatur,” they are directed to enquire as to the mode by which he came by his death. Now, taking the whole of this together, it appears to me that there can be no good inquest unless the coroner and the jurors are both present at the same time, and the oath is administered by the former to the latter *super visum corporis*. If, indeed, after this inquest had proceeded, upon the arrival of the coroner himself, both he and the jury had gone to view the body, and the jury had then been re-sworn, it might have been a good inquest. That, however, was not done; and, therefore, I am of opinion

[†] 2 H. H. 59, 60.

[‡] 2 Hawk. c. 9, s. 23.

that this inquest was wholly void, and that we ought not to grant any mandamus to continue its proceedings.

THE KING
v.
FERRAND.

BAYLEY, J. :

I entertain no doubt upon the present question. Looking at the different authorities which have been cited, and the form of inquisitions which are invariably stated to be taken "upon the view of the body of A. B., now lying dead," this question seems to be placed beyond all doubt. The words of the statute "*De Officio Coronatoris*" are very emphatical; "*ad occisos accedant vel ad subito mortuos.*" The coroner, therefore, is to go to the dead body, and the jury are there to be sworn to inquire into the cause of the death. The coroner's duty is partly judicial. It belongs to him, and to *him only, to administer the oath to the jury, who cannot, as it seems to me, be properly sworn unless by the coroner and *super visum corporis*. Now in the present case it appears, that on the 8th of September the oath of inquest was administered, and the dead body viewed by the jury. But then the oath was administered by a person wholly without authority. At that time, therefore, the jury were not under a valid obligation to inquire, but were mere strangers to the transaction. And when the jury were sworn afresh by the coroner, upon his arrival, it was not done *super visum corporis*. Nor, indeed, did they ever view the body after the oath was administered to them by the coroner. For though, on the 24th of September, the coroner viewed the body, the jury were not then present. I am, therefore, of opinion that we ought not to make this rule absolute. For we should be doing great injustice if we were to grant a mandamus to the coroner to proceed in an inquiry illegally commenced, illegally proceeded in, and which can have no proper or satisfactory result.

[*263]

HOLROYD, J. :

I am of the same opinion. If this inquest were to proceed, it would be utterly illegal. For though the statute *De Officio Coronatoris* does not expressly say that the coroner shall take his inquest on the view of the dead body, and that an inquest otherwise taken by him shall be void, yet it is clearly laid down by all the books, that a coroner has no manner of power to take

THE KING
v.
FERRAND.

[*264]

an inquisition of death without a view of the body, and that any such inquest taken by him without such view is merely void. Unless it be an inquest *super visum corporis* it is wholly an extra-judicial proceeding. *In this case, if the jury had been sworn afresh by the coroner when he viewed the body, and the witnesses had been examined afresh, the inquest would have been legal. But that was not done; and I am of opinion that we ought not to grant a mandamus to continue a proceeding so illegally conducted.

BEST, J. :

I am clearly of opinion, that the proceedings before the coroner have been conducted with so much irregularity, that a valid inquest cannot now be found. We ought not to compel by mandamus the coroner to proceed, when we are satisfied that the inquest, when found, must be quashed by the Court into which it will be returned. The jury were summoned by and sworn before the coroner's clerk. Now if the coroner could act by deputy, and this clerk was duly appointed such deputy (which does not appear), the inquiry should have been concluded before him. But after this the coroner makes his appearance, and goes on, having re-sworn the jury, but without having had any view. After several more days are consumed in examining witnesses before the coroner, it is suggested to him that he has had no view of the body, and, therefore, that he had no authority to proceed with the inquest. Upon this suggestion he goes to the church, causes the body to be disinterred, just looks at the face of the deceased, and then orders the corpse to be again covered up. This was not a sufficient view of the body to give him authority to proceed. He should have had an opportunity of seeing whether there were any marks of violence, and of ascertaining, from the appearance of the body, what was the occasion of the death of the deceased. At the time that he took the view,

[*265]

the *jury should have attended him, that they might have had the advantage of his remarks on the appearances that the body exhibited. It has been said, it is sufficient if the jury see the body at one time, and the coroner at another; as well might it be said that the judge might hear the evidence at one time and the jury at another. If, however, this view was sufficient, the

coroner should have sworn the jury again, and proceeded *de novo*. Instead of this he goes on, adding other evidence to what had been taken before the view by himself, and the whole mass was to be summed up to the jury, who were never regularly sworn at all. The passage which I referred to during the argument, from Hawkins, shews that an inquest so taken must be quashed. Let it not, however, be understood that it is likely that public justice will be impeded by this accident. The proceeding before a coroner is only one of several in cases of murder: application may still be made to magistrates or grand juries; and I do not lament that an inquiry is stopped, which has been so illegally conducted as the one now before the Court.

THE KING
v.
FERRAND.

Rule discharged.†

Cross, Serjt. and I. Williams, were to have shewn cause.

† In 2 H. H. 58 it is said, if a coroner take an inquisition without view of the body, he may take a second inquisition *super visum corporis*, and that second inquisition is good, for the first was absolutely void. And in p. 66, after stating that the coroner can only take an inquisition *super visum corporis*, [HALE] adds, And, therefore, in ancient times, if a man were hurt in the county of A. and died in the county of B., the coroner of B. could not take an inquisition of his death, because the stroke was not given in that county, and the coroner of A. could not take the inquisition, because the body was in the county of B.: but they used to remove the body into the county of A., and then the coroner of A. used to take the inquisition. 6 Hen. VII. 10, a.; and the statute referred to by the Court, De Officio Coronatoris, at the conclusion, after describing the mode of taking the inquest, says, Et hiis inquisitis statim sepeliantur corpora mortuorum vel occisorum. So that anciently it should seem, the body was lying before the jury and coroner during

the whole inquest; and in truth, the body is itself part of the evidence to the jury. If, then, they see it before, but not after they are sworn, a material part of the evidence given to them is given when they are not upon oath. In corroboration of this view of the subject, it is to be observed, that "if the body be not found, or if it have lain so long before the coroner hath viewed it, that he can in no way be assisted from the view in taking his inquest, or if there be danger of infecting people in digging of it up, the inquest ought not to be taken by the coroner, unless he have a special writ or commission for that purpose," Hawk. lib. 2, c. 9, s. 23; and with respect to a second inquest, the law is thus laid down. So also, he may dig up the body, if the first inquisition be quashed, Str. 533. But it must be by order of the King's Bench on motion, Str. 167. And the Judges will exercise their discretion, according to the time and circumstances, whether he shall or shall not do it. Salk. 377; Str. 22, 533; 2 Mod. 16.

[*266 n.]

1819.
Nov. 29
[266]

THE COMPANY OF PROPRIETORS OF THE MARGATE PIER *v.* GEORGE HANNAM, Esq.,
JAMES DYSON, Esq., AND TWO OTHERS.

(3 Barn. & Ald. 266—271.)

The acts of a justice of the peace, who has not duly qualified, are not absolutely void; and therefore, persons seizing goods, under a warrant of distress, signed by a justice who had not taken the oaths at the General Sessions, nor delivered in the certificate required, are not trespassers.

TRESPASS for taking goods: Plea, not guilty. There were two questions in the case: First, whether the plaintiffs were liable to be rated to the poor. The Court decided that they were; and their judgment was grounded on the special provisions of the Acts of Parliament creating the company, and the peculiar nature of the property. It is, therefore, unnecessary to state that part of the case. The second question was, whether the warrant of distress, signed by the defendants, Hannam and Dyson, was legal; and that depended upon the question, whether the acts done by Dyson, as a justice for the Cinque Ports, were valid, *he having omitted to deliver in a certificate, or to take the oath at the General Sessions in the Cinque Ports, as required by the Act of Parliament. The facts of the case, and the clauses of the Acts of Parliament applicable to the question, are fully stated by the LORD CHIEF JUSTICE, in delivering the judgment of the Court. The case was argued by *Adolphus* for the plaintiff, and *Bolland* for the defendant. For the plaintiff it was urged, that the 51 Geo. III. c. 36 † required the justices for the Cinque Ports to qualify, and that the Indemnity Act applied only to those who actually did qualify. Here, the defendant, Dyson, had not qualified at the time of the trial. This was not like the case of a person who practised as an attorney without being duly admitted. His acts, indeed, were valid; but they were cured, from time to time, by the acts of the parties on the other side. For the defendant, it was urged, that the acts of the defendant, Dyson, were not void, although he might be liable to a penalty for having acted without being duly qualified. The 18 Geo. II. c. 20 expressly imposed a penalty on such a person acting as a justice

[*267]

† See 18 & 19 Vict. c. 48, s. 5.

without being qualified. The 51 Geo. III. c. 36 applied to the Cinque Ports, and was *in pari materia*. The penalty, though not expressly mentioned in that Act, will attach. The words of the 51 Geo. III. c. 36 were not stronger than the 13 Car. II., which makes void the election of any corporate officer who shall not have taken the sacrament within a year. The annual Indemnity Act relieves such a person from all penalties, and makes his intermediate acts valid. This was like the case of a person practising as an attorney without being duly admitted: he was liable to a penalty, but his acts were not void. The inconvenience that would follow from the construction of the Act contended for, on the part of *the plaintiff, would be very great. Every person acting under the authority of such a magistrate would be guilty of an unlawful act, and resistance to him would be lawful. A constable might even, in such a case, become liable to a charge of murder.

THE
MARGATE
PIER CO.
v.
HANNAM.

[*268]

Cur. adv. vult.

ABBOTT, CH. J. now delivered the judgment of the COURT:

This was an action of trespass, brought for levying certain poor-rates for the parish of Saint John the Baptist, in the Isle of Thanet. There had been three rates, all regularly made and published. Two of the three had been duly allowed by two of the justices of the Cinque Ports. The third was allowed by the defendants, Hannam and Dyson, acting as such justices: the warrants of distress had been issued by these defendants, and executed by the other two defendants, one of whom was an overseer of the poor, and the other a constable of the parish. Copies of the warrants had been demanded, and notice of the action given. A case was reserved at the trial of the cause, upon two questions: first, Whether the plaintiffs were liable to be rated for the relief of the poor; secondly, whether the acts of the defendant, Dyson, as a justice of the peace for the liberties of the Cinque Ports, in the matter in question, were valid or not. The case was argued before us upon the first question at Serjeants' Inn Hall, and we then gave our opinion in the affirmative, viz. that the plaintiffs were liable to be rated for the relief of the poor.

THE
MARGATE
PIER CO.
v.
HANNAM.

[*269]

The second question was spoken to at the same time, and afterwards more fully argued here during the present term. It arises in this manner: By an Act of the 51st of his present Majesty, c. 36, his Majesty is authorised to issue a commission, to be directed to certain persons *to be therein named, constituting them to be justices of the peace within and throughout the liberties of the Cinque Ports, and investing them with the same power and authority as belongs to any mayor, bailiff, or jurat, to exercise within the liberties of the town whereof he is mayor, bailiff, or jurat, "And from and after" (these are the words of the statute) "such commission or commissions shall have so issued, all persons and every person named in any such commission or commissions, shall be and they and each of them is and are hereby declared to be justices and a justice of the peace within and throughout the liberties of the Cinque Ports, and invested with the same power and authority within and throughout the same," as belongs to any mayor, bailiff, or jurat within his port or town. By the third section of this Act it is provided and enacted, "That no person or persons to be named in such commission shall be thereby, or by this Act, authorised to act as a justice of the peace, unless he shall have such qualification as will authorise him to act for a county, and unless he shall have taken and subscribed the oaths, and delivered in at some General Sessions to be holden in some one of the Cinque Ports, the certificate respectively required to be taken and subscribed and delivered in by persons qualifying themselves to act for counties." The defendant, Dyson, had taken the oaths under a writ of *dedimus potestatem*, but he had omitted to deliver a certificate, or take any oath at any General Sessions in any one of the Cinque Ports; and upon this omission the objection to the validity of his acts as a justice was grounded.

[*270]

We are of opinion, that, notwithstanding this omission, his acts as a justice, in the matters in question, were *valid. An objection of the same nature may happen to arise in some cases of persons acting as justices for counties at large; and this gives a general importance to the question. By the statute 18 Geo. II. c. 20,† it is enacted, "That no person shall be capable of being a justice, or acting as such for any county, without the qualifica-

† See 38 & 39 Vict. c. 54.

THE
MARGATE
PIER CO.
v.
HANNAM.

tion by estate therein mentioned, and who shall not take, at some General or Quarter Sessions, the oath therein prescribed." And by the second section, "Any person who shall act as a justice without having taken the oath, or without being qualified, shall forfeit 100*l*. It is obvious that if the act of the justice, issuing a warrant, be invalid on the ground of such an objection as the present, all persons who act in the execution of the warrant will act without any authority: a constable who arrests, and a gaoler who receives a felon, will each be a trespasser; resistance to them will be lawful; everything done by either of them will be unlawful; and a constable, or persons aiding him, may, in some possible instance, become amenable even to a charge of murder, for acting under an authority, which they reasonably considered themselves bound to obey, and of the invalidity whereof they are wholly ignorant. An exposition of these statutes, pregnant with so much inconvenience, ought not to be made, if they will admit of any other reasonable construction. "Acts of Parliament," says Lord Coke, "are to be so construed, as no man that is innocent, or free from injury or wrong, be by a literal construction punished or endamaged." We think these Acts do most reasonably admit of another construction. We think the restraining clauses are only prohibitory upon the justice. By the particular Act upon which this question has arisen, Mr. Dyson, *having been named in the commission, is declared to be a justice, and invested with power and authority as such. The proper effect, therefore, as it seems to us, of the third section, is only to make it unlawful in him to act as such; but not to make his acts invalid. Many persons, acting as justices of the peace in virtue of offices in corporations, have been ousted of their offices from some defect in their election or appointment; and although all acts, properly corporate and official, done by such persons, are void, yet acts done by them as justices, or in a judicial character, have in no instance been thought invalid. This distinction is well known. The interest of the public at large requires that the acts done should be sustained: sufficient effect is given to the statutes by considering them as penal upon the party acting. No pecuniary penalty, indeed, is imposed by the statute 51 Geo. III.; but a justice

[*271]

SARGENT BAYLEY, J. :

v.
MORRIS.

[*281]

This is an action on a special contract ; and the declaration states, that the plaintiff caused to be shipped on board the defendant's vessel certain goods, to be carried and delivered to the plaintiff, and that he undertook and promised the plaintiff accordingly. The declaration therefore describes the plaintiff as the original shipper, and the original contract as having been made with him. Now I take the rule to be this ; if an agent acts for me and on my behalf, but in his own name, then, inasmuch as he is the person *with whom the contract is made, it is no answer to an action in his name, to say that he is merely an agent, unless you can also shew that he is prohibited from carrying on that action by the person on whose behalf the contract was made. In such cases, however, you may bring your action, either in the name of the party by whom the contract was made, or of the party for whom the contract was made. In policies of insurance, it is a common practice to bring your action either in the name of the agent or principal. In this case the contract appears, by the terms of the bill of lading, to have been made with the Spanish house. Then for whom was it made? why, upon the evidence in the cause, on account of the Spanish house. It is, however, urged, that inasmuch as Sargent had made certain advances on their account, they were his goods at the time of the shipment. Now, in the first place, there is no evidence to shew that, at the time of the shipment, he had made any advance whatever. At that time the right of action was vested in the party to whom the goods belonged. What was done subsequently does not affect this point. As to the advance, I take it to have been made in the ordinary way in which an agent makes an advance for his principal, in respect of which he would be entitled to sue his principal, on whose credit the advance was made. If, indeed, the goods had reached his possession, he might have had a lien till he had been repaid ; but no lien can take place till the goods come into his possession. The prospect of a lien made in respect of advances subsequent to the shipment never can satisfy the allegation of the plaintiff, that he had caused the goods to be shipped, and that the defendants contracted with him to deliver ; the *contract, in fact, was not with

[*282]

him, but with Bayo. For these reasons, it seems to me that the contract is not made out in evidence, and that the action cannot be supported.

SARGENT
MORRIS.

BEST, J. : †

I am of the same opinion. In the case of *Evans v. Marlett*, ‡ this distinction is taken. If goods by bill of lading are consigned to A., A. is the owner, and must bring the action against the master of the ship if they are lost; but if the bill be special to deliver to A. for the use of B., B. ought to bring the action. That case is precisely in point. I think that the action here must be brought in the name of Bayo, the contracting party. It would be a very different case, if this had been an action of trover against a person who had prevented the plaintiff from having his lien. It is impossible to say that he is one of the original contracting parties in this case, which he must be in order to entitle him to bring this action.

Rule absolute for entering a nonsuit.

Marryat and *Campbell* were to have argued in support of the rule.

THOMPSON v. LACY.

(3 Barn. & Ald. 283—287.)

1820.
Jan. 24.

[283]

A house of public entertainment in London, where beds, provisions, &c. are furnished for all persons paying for the same, but which was merely called a tavern and coffee-house, and was not frequented by stage coaches and waggons from the country, and which had no stables belonging to it, is to be considered an inn, and the owner is subject to the liabilities of innkeepers and has a lien on the goods of his guest for the payment of his bill. So held even where the guest did not appear to have been a traveller, but one who had previously resided in furnished lodgings in London.

TROVER for goods. Plea, not guilty. At the trial before Abbott, Ch. J. at the London sittings after last Trinity Term, it

† HOLROYD, J. absent at the Old Bailey.

‡ 1 Ld. Ray. 271.

THOMPSON
v.
LACY.

appeared the defendant kept a house of public entertainment, called the Globe Tavern and Coffee House, in Fore Street, Moorgate, where he provided lodging and entertainment for travellers and others. No stage coaches or waggons stopped there, nor were there any stables belonging to the house. The plaintiff, in December, 1818, having lived before that time in furnished lodgings in London, went to the defendant's house and engaged a bed; he continued to reside there for several months, and then left the place. The defendant, in his bill, charged for eighty-three nights' lodging; and claimed to detain the goods mentioned in the declaration, on account of money due to him for lodging and entertainment provided for the plaintiff. Upon these facts, the LORD CHIEF JUSTICE was of opinion that the defendant had a lien upon the goods, and the plaintiff was nonsuited, with liberty to move to enter a verdict for nominal damages, the plaintiff undertaking in that case to re-deliver the goods. A rule *nisi* having accordingly been obtained in the last Term for that purpose,

Marryat and *E. Lawes* now shewed cause:

[*284] The defendant is substantially an inn-keeper. It is not necessary that every inn should have stables, for there are many country inns frequented by the lower classes, where there are no stables, and the circumstance of the *defendant's house being in London, which is more frequently the termination of a journey, makes no difference, for it is as important for the traveller to be furnished with accommodation at the end of his journey as in his progress. A guest would have the same right to claim entertainment at the defendant's house, as at any country inn, and in *Parkhurst v. Foster*† an inn is said to be a place where all persons have a right to claim to be entertained as guests.

Gurney and *F. Pollock*, *contrà*, in support of the rule contended, that the defendant did not keep an inn, and even if he did, that the plaintiff was not, with respect to his residence at his inn, within the rule of the common law, inasmuch as he had

† 1 Salk. 387.

previously been continually resident in London. In *Calve's* case,[†] it is laid down, that common inns are instituted for passengers and wayfaring men; for the Latin word for an inn is *diversorium*, because he who lodges there is, *quasi divertens se a via*. And therefore if a neighbour who is no traveller, at the request of the innholder, lodges there as a friend, and his goods be stolen, &c. he shall not have an action. The defendant's coffee-house is not intended for wayfaring men, and even if it were, the plaintiff, an inhabitant of London, frequenting it, and even sleeping there, is not a wayfaring man within the rule. Besides, an inn ought to have the means of entertainment for the horses of travellers, and here there were no stables; and in London, houses frequented by stage coaches and waggons are alone termed inns.

THOMPSON
v.
LACY.

ABBOTT, Ch. J.:

[285]

The defendant in this case keeps a house, where he furnishes beds and provisions to persons in certain stations of life, who may think fit to apply for them. I do not know that an innkeeper can do more; for he does not absolutely engage to receive every person who comes to his house, but only such as are capable of paying a compensation suitable to the accommodation provided. Now it appears to me, that the defendant cannot be distinguished from a person who keeps an inn in the country, in the way of travellers. We should otherwise be obliged to say, that a person who arrives at a house of public entertainment in a post-chaise, and desires to have his supper and bed, meaning to go away on the following morning, would be a traveller, and that the landlord who gave him the accommodation required, would be an innkeeper: and yet that if such a guest then removed to the defendant's house, the latter, although he should give him the same accommodation, would not be an innkeeper. Such a distinction would lead to a very nice inquiry in each particular case. It seems to me, therefore, that it would be better, both for the persons who keep such houses and for those who frequent them, that we should consider this house as falling within the rule of law applicable to inns. By so deciding, the

[†] 8 Co. Rep. 683.

THOMPSON
v.
LACY.

[*286]

guest will have the protection of the law for the security of his goods, if they are lost or stolen, and the person who keeps the house will also have the benefit of the law, which allows him to retain the goods of his guest to ensure the payment of his demand. I am now speaking of a case where the party was in the habit of sleeping in the house. As I cannot, therefore, distinguish a house like that of the defendant, who furnishes every accommodation to all *persons for a night or longer, from a country inn, I think that the nonsuit was right, and that this rule must be discharged.

BAYLEY, J. :

I am of opinion that this is substantially an inn. In order to learn its character, we must look to the use to which it is applied, and not merely to the name by which it is designated. Now this house was used for the purpose of giving accommodation to travellers, who, in London, reside either in lodgings or inns. The defendant did not merely furnish tea and coffee as the keeper of a coffee-house does, nor a table as the keeper of a tavern does ; but he provided lodgings, and that in the way they are provided at inns : for the charge was at so much per night. In the *Six Carpenters'* case,† a tavern is so far considered as an inn, that all persons are said to have a right to enter it. And I take the true definition of an inn to be, a house where the traveller is furnished with every thing which he has occasion for whilst upon his way. It has been said, however, that in London the character of inn belongs only to those houses of public entertainment frequented by waggons and stage coaches. Now if the liability of a party as innkeeper depended on such a circumstance, it would follow that a person coming to such a house as this from the country in his own private carriage, or in a post-chaise, could not be entitled to consider the owner as responsible for the safety of his goods. It has also been urged, that to constitute an inn there should be stables annexed to it : if that were so, many inferior houses of entertainment in the country, *frequented by foot travellers, would not come within the description ; and the poorer travellers would not have the

[*287]

† 8 Co. Rep. 290.

THOMPSON
v.
LACY.

protection which the law gives to a guest against an innkeeper. I think, therefore, that in point of law this is an inn, and that the defendant is under the obligations to which innkeepers are liable, viz. that he is bound to receive all persons who are capable of paying a reasonable compensation for the accommodation provided, and that he is liable for their goods, if lost or stolen; and, on the other hand, that he has a lien on the goods of his guests for the payment of his bill. This rule must, therefore, be discharged.

BEST, J. :

I am of opinion that the defendant's house, under the circumstances of this case, is to be considered as an inn. The consequence of which is, that he has a lien on the goods of his guests; and, on the other hand, that he is responsible to them for property left in his care. An inn is a house, the owner of which holds out that he will receive all travellers and sojourners who are willing to pay a price adequate to the sort of accommodation provided, and who come in a situation in which they are fit to be received. In this case, the defendant does not charge as a mere lodging-house keeper, by the week or month, but for the number of nights. A lodging-house keeper, on the other hand, makes a contract with every man that comes; whereas an innkeeper is bound, without making any special contract, to provide lodging and entertainment for all, at a reasonable price. I think, therefore, this rule should be discharged.

Rule discharged.

1820.
Jan. 24.

[288]

BATTLEY AND ANOTHER v. FAULKNER AND ANOTHER.†
(3 Barn. & Ald. 288—296.)

Where A., under a contract to deliver spring wheat had delivered to B. winter wheat, and B., having again sold the same as spring wheat had, in consequence, been compelled, after a suit in Scotland which lasted many years, to pay damages to the buyer, and afterwards B. brought an action of assumpsit against A. for his breach of contract, alleging as special damage, the damages so recovered: Held, that although the special damage was ascertained within six years before the commencement of the action by B. against A., yet that the breach of contract, which, in assumpsit, was the gist of the action, having occurred and become known to B. more than six years before that period, A. might properly plead *actio non accrevit infra sex annos*.

ASSUMPSIT. The declaration stated, that in consideration that plaintiff would buy of defendants a certain quantity of spring wheat for seed; the defendants undertook, that the same should be spring wheat. Breach, that the wheat was not of that description; but, on the contrary, was, at the time of the sale, winter wheat. It then stated, as special damage, that the plaintiffs had sold the wheat to one Shepard as spring wheat, and that he had caused it to be sown as such wheat in the spring of the year 1810, and that the wheat became and was unproductive, and would not ripen or bring crops to maturity in that year, whereby Shepard lost the use of his land. It then stated, that an action was brought by Shepard against the plaintiffs, in the Court of Session in Scotland, for the damage sustained by him, in consequence of the wheat not being spring wheat, and that he recovered damages and costs. Plea, first, general issue; secondly, that the cause of action did not accrue within six years. At the trial before Abbott, Ch. J. at the London sittings after last Trinity Term, it appeared on the statement of plaintiff's counsel, that in the early part of the year 1810, the plaintiffs, who reside in Scotland, bought the wheat in question of the defendants, as spring wheat, and sold it as such to one Shepard, who having sown his land with it, and

† See also *Short v. M'Carthy*, p. 503, *post*; *Howell v. Young* (1826) 5 B. & C. 259; 8 Dowl. & Ry. 14; 2 C. & P. 238. Compare cases of concealed fraud, per Lord MANSFIELD in *Bree v. Holbech*, 2 Doug. 654, 655; *Gibbs v. Guild* (1881) 8 Q. B. D. 296, 9 Q. B. Div. 59; 51 L. J. Q. B. 228, 313.—R. C.

having discovered, in the autumn, that it was almost wholly unproductive, gave notice to *the plaintiffs, that he considered them responsible to him for the loss of his crop from the lands where it was sown. The plaintiffs communicated this to the defendants; and, after Shepard had commenced proceedings in the Scotch Court against them, in June, 1811, gave the defendants notice that he had done so, and was about to assess damages against them. Nothing more passed between the parties till the beginning of the year 1818, when the suit in Scotland being then completed, the plaintiffs paid Shepard his damages and costs, and commenced the present action against defendants, to recover such damages and costs as special damage, resulting from the breach of the warranty. The CHIEF JUSTICE, on this statement, which was agreed to on both sides, asked if there was any promise to take the case out of the Statute of Limitations; and being answered in the negative, nonsuited the plaintiffs. In the last Term, *Scarlett* obtained a rule to shew cause why the nonsuit should not be set aside, and, a new trial had; and now

BATTLE
v.
FAULKNER.
[*289]

Marryat and *F. Pollock* shewed cause. * * *

Scarlett and *Tindal*, *contrà*. * * *

[291]

ABBOTT, Ch. J. :

[292]

It appears to me that the nonsuit in this case was right. The cause of action which the plaintiff has brought, arose out of the delivery to him of wheat of a different kind from that which the defendant had contracted to deliver. The wheat delivered was not only useless, but worse than useless, because it did not grow, and consequently the profit which might have arisen from the land on which it was sown was lost. Now, when did these matters occur? They occurred in 1810 and 1811, and undoubtedly it was then that the cause of action accrued. The Statute of Limitations was intended for the relief and quiet of defendants, and to prevent persons from being harassed at a distant period of time after the committing of the injury complained of. It seems to me, that this case falls within the very words of the

BATLEY
v.
FAULKNER.

statute, and that the cause of action existed more than six years before the action was brought. It is true that the particular damage sustained was not all known till a considerable time afterwards. It would be extremely dangerous to enquire in every particular case, the precise period of time when the damage first came to the knowledge of the plaintiff, and in many instances it would deprive the party of the benefit which the Legislature intended to confer upon him. The plaintiff in this case, might, as soon as he knew of the defective quality of the wheat, or at any time within the six years have sued out a writ, and have thus obtained an efficient remedy against the defendant; it is by his own negligence *that he is deprived of his remedy, and he has no right to complain.

[*293]

BAYLEY, J. :

The statute says that you shall bring your action within six years next after the cause of action and not after. This is an action for a breach of contract, and the cause of action arises at the time when the contract is broken. Since that time, certain damages have resulted from that breach of contract. The breach of the contract, however, is the gist of the action, and the special damage is stated merely as a measure of the damages resulting from that cause of action. If the plaintiff had failed in proving the special damage in this case, it would not have been a ground of nonsuit. One of the objects of the Statute of Limitations was, that actions should be brought to trial at a period of time when the defendant could be prepared with his witnesses to meet the charge, which would not be the case if the action might be postponed to an indefinite period. Now see what the consequences might be if the party was bound only to sue out his writ at the time when the measure of damages was ascertained, and not when the contract was broken. Suppose, for example, the present plaintiff had sold the wheat to Shepard, and he had sold it again to A., and A. to B., and B. to C. ; then suppose C. to wait for five years, and then to bring an action against B. and recover, and that at the end of five years more B. should bring an action against A. and that A. at the end of another five years brought an action against Shepard, and that Shepard took five

years more before he brought his action against the present plaintiff. Then, according to the argument, each party having acquired a new cause of *action, the present plaintiff might, twenty-five years after the original transaction, bring an action against the present defendant. Now it is by putting an extreme case, that you often try the propriety of a rule. If the plaintiff in this case had released the defendant from the breaches of contract, that release would have been a bar to the present action for the special damage subsequently accruing; and this shews that the foundation of the action is the breach of contract. It was, therefore, from the period when the contract was broken that the cause of action accrued; and as that happened more than six years before the commencement of the present action, I think the nonsuit was right.

BATTLEY
F.
FAULKNER.
[*294]

HOLROYD, J. :

In this case, the breach of the contract is the very gist of the action; and the reason why special damage is stated, is because mere collateral damage must be stated in the declaration, in order to entitle the plaintiff to give it in evidence, lest otherwise the defendant might be taken by surprise. It is true, that assumpsit is a species of action on the case; but it differs materially from an action on the case founded on a wrong. In the latter form of action the plea is not guilty; in the other, it is non-assumpsit. Assumpsit will lie against executors; but case does not; nor can assumpsit be joined with counts founded upon a tort. It does not, therefore, follow, that because assumpsit is an action on the case, and that special damage is stated, that the breach of contract is not the gist of the action. It is said, however, that although the action might be maintained upon the breach of promise, yet that the damage subsequently sustained, forms a substantive ground of action; but it cannot be so considered in this form of action. *According to that argument, the action ought to have been brought for the tort. Supposing, however, that the pleadings had been differently framed, I do not know that the party would be benefited, for it seems to me, in this case, that the damage has originated substantially out of a breach of contract, and, therefore, the plaintiff could not have

[*295]

BATTLE
v.
FAULKNER.

gained any advantage by changing the form of remedy. It is sufficient, however, to say, that this action is particularly founded on the breach of contract, and that being so, the nonsuit was right.

BEST, J. :

It appears to me that the terms of the statute are extremely clear and unambiguous. It says, that the action must be brought within six years after the cause of action, and not after. The only question, therefore, is, when the cause of action accrued; for the statute then attached. I think that the cause of action accrued the moment the defendant failed to perform that which he agreed to do. Now he contracted to sell wheat of a particular quality, and the wheat is, in fact, of a different quality. The cause of action was therefore complete, and the statute began to operate from the time of the delivery of the wheat. It is said, however, that the plaintiff might have adopted a different form of action and proceeded for the fraud. If however the action had been founded on fraud, it seems to me that the fraud was complete when the wheat was forwarded to Scotland. In this case the plaintiff might have issued his writ for the purpose of keeping the action alive. The object of the Statute of Limitations was to prevent persons from being charged with claims, who, in consequence of the lapse of time, *might have no means of proving a discharge. If a party is served with a writ, he knows it is necessary to preserve the evidence; and therefore he is on his guard. If, however, there be no legal proceedings against him, he imagines that there is no cause of complaint. If a long period of time elapse, his witnesses may die, and he may be unable to give an answer to the claim. It seems to me much better that parties should be put to bring their action as soon as they can; and, upon the whole, I think that this nonsuit was right.

[*296]

Rule discharged.

BREWSTER *v.* SEWELL.

(3 Barn. & Ald. 296—304.)

1820.
Jan. 24.
[296]

In 1813, a fire occurred on the plaintiffs' premises, insured with the E. Insurance Company, and the company settled the loss. In 1819 an action was tried, for an alleged libel charging the plaintiff with having defrauded the insurance company. At the trial the plaintiff called the company's agent, who stated that the policy was returned to him after the fire, and that he had it in possession then, and afterward, when the plaintiff made a larger insurance with the company; that upon the loss having been settled, the old policy became an useless paper; that he did not know what had become of it, but he believed he had returned it to the plaintiff. The clerk to the plaintiff's attorney then proved, that within a few days of the trial, he went to plaintiff's house to search for the policy, when the plaintiff shewed every drawer where he usually kept his papers; that he examined such drawers, and every other place where he thought it likely to find such a paper, without finding it:—Held, that this was sufficient to entitle the plaintiff to give secondary evidence of the contents of the policy.

ACTION for a libel. Declaration stated, that the plaintiff had effected a policy of insurance against fire, with the Essex Insurance Society, upon which a loss happened, and then set forth the libel, which charged the plaintiff with fraud, in certain claims made by him in respect of such loss by fire. Pleas, not guilty, and a justification. At the trial before Garrow, B. the plaintiff not being able to produce the original policy, gave the following evidence, with a view to entitle him to give secondary evidence of its contents. An agent of the company stated, that in 1813, there was a fire in the plaintiff's premises, and that on the day following the fire, the policy was placed in his hands; that he had it in his possession at the time of the loss, and *also afterwards, when the plaintiff came to make another larger insurance, and that upon that insurance being made, in witness's opinion the original policy became a useless paper, and that he did not know what became of it afterwards. He had searched for it, but could not find it. He rather thought he must have returned it to the plaintiff, but he was not certain. The clerk to the plaintiff's attorney was then called, who stated, that on a few days before the trial, he went to the plaintiff's house for the purpose of searching for the policy in question; that the plaintiff himself shewed him the drawers where his papers were,

[*297]

BREWSTER
v.
SEWELL.

and that the witness minutely examined the drawers, and could not find the policy ; they opened every drawer in the place, and went into an old lumber room at the top of the house, examined some piles of papers there, and searched the iron chest ; they did not, however, search the out-houses, barns, hay-loft, or granary. GARROW, B. was of opinion, at the trial, that this was not sufficient evidence of the destruction of the policy, so as to let in secondary evidence, and he nonsuited the plaintiff. A rule nisi having been obtained in Michaelmas Term last, to set aside this nonsuit,

Marryat and Jessopp now shewed cause. * * *

[298] *Gurney, Nolan, and Walford, contra*, were stopped by the COURT.

ABBOTT, Ch. J. :

[*299] All evidence is to be considered with regard to the matter with respect to which it is produced. Now it appears to be a very different thing, *whether the subject of inquiry be a useless paper, which may reasonably be supposed to be lost, or whether it be an important document which the party might have an interest in keeping, and for the non-production of which no satisfactory reason is assigned. This is the case of a policy of insurance, by which a company undertook to indemnify the plaintiff against losses by fire. A fire took place and a loss was paid. That having taken place, the original policy became mere waste paper. There was no reason to suppose, that the policy could, at any future time, be called for, to answer any reasonable purpose whatever. In that respect, such a document differs most essentially from an indenture of apprenticeship. The latter instrument may be useful, after the apprenticeship is expired, to entitle the party to the freedom of a corporation, or to exercise a trade, or it may be evidence of his settlement ; any of these reasons may induce a person to take care of such an instrument. So, also, there are reasons to induce a person to take care of an expired lease, for such an instrument may shew distinctly the terms upon which the estate was held. There is no rational

BREWSTER
v.
SEWELL.

ground, however, upon which any person could expect that such an instrument as the present should have been wanted. This being a case, therefore, where the loss or destruction of the paper may almost be presumed, very slight evidence of its loss or destruction is sufficient. Now here the clerk of the insurance company leaves it extremely doubtful on his testimony, whether the paper which was last seen in his hands, had been retained by him or returned to the plaintiff. If it were retained by him, he has proved that he searched for, but could not find it. If it were not retained by him, it was probably *delivered back to the plaintiff. Nobody supposed that it was wanted until the counsel suggested that it might be required at the trial. The clerk of the plaintiff's attorney then went to the plaintiff's house, where the plaintiff himself shewed him all his drawers and places where a person might reasonably be supposed to keep his papers; the clerk examines them all, searches a pile of papers, opens the iron chest, and, in short, he looks not only in every place which the plaintiff pointed out, but in every place which he thought, on his view of the premises, was likely to contain a paper of this description. Upon such evidence, applied to such a paper, it does appear to me to be reasonable to presume that it was lost, and that the legal presumption is, that it is absolutely lost. If the case had not stopped there; if the plaintiff had produced a copy, or had given parol evidence of its contents, it might then have been time to inquire, whether there was a subscribing witness. The party was stopped before any secondary evidence was given on the subject; it seems to me, therefore, that this rule should be made absolute.

[*300]

BAYLEY, J. :

I am of the same opinion. There is a great distinction between useful and useless papers. The presumption of law is that a man will keep all those papers which are valuable to himself, and which may, with any degree of probability, be of any future use to him. The presumption on the contrary is that a man will not keep those papers which have entirely discharged their duty, and which are never likely to be required for any purpose whatever. Under the circumstances of this case,

BREWSTER
r.
SEWELL.
[*301]

and considering the lapse of time which has occurred, I should have thought that much *less evidence would have been sufficient to entitle the party to give the secondary evidence. The policy in question had discharged its duty in 1813, and a new policy was then granted. At that time the policy in question was removed from the plaintiff's house, where he kept his valuable papers. Now for what purpose should he afterwards replace it there? The presumption and the probability would be, that it could not be of any future use, and that it would merely be an incumbrance to the place in which it was put. I think that the presumption of law would be, that after a reasonable lapse of time, such a paper would have ceased to have an existence; because, in the exercise of ordinary prudence, a man would not keep a document of that kind, but would destroy it. It seems to me, therefore, that there is abundant ground in this case for letting in the secondary evidence. An indenture of apprenticeship is one of the muniments of the party, relating to certain rights belonging to him, which may be varied, according as he may prove that he had an indenture or not; and the probability would be, that as there is a reason why it should be taken care of, it will not be destroyed. So, also as to expired leases, it is often of great importance to the lessor to produce those instruments, to shew the terms of those leases, and other circumstances connected with the estate; they are part of the landlord's muniments. The lessee also may, at some distance of time, be called upon to account for the muniments of his farm. I am not aware of any case where a landlord has been precluded from giving parol evidence of the contents of a lease, when he has shewn that he has had his muniments destroyed by accident, and had applied to the *lessee, to know if he had got any counterpart. I do not know that in such a case it must be shewn, in order to give secondary evidence, that the lessee has searched in the place where he usually kept his muniments. I am, therefore, of opinion, that the rule for a new trial should be made absolute.

[*302]

HOLROYD, J. :

I am also of opinion, in this case, that the secondary evidence

ought to have been received. It appears that the document had for some time become wholly useless. The contents of the paper, at least as far as particular terms of the policy were concerned, were perfectly immaterial. The only question was, whether it was a policy upon the property of a particular individual. Now the reason why the law requires the original instrument to be produced, is this, that other evidence is not so satisfactory, where the original document is in the possession of the party, and where it is in his power to produce it or to get it produced, provided he gives notice. In either of these cases, if he does not produce it, or take the necessary steps to obtain its production, but resorts to other evidence, the fair presumption is, that the original document would not answer his purpose, and that it would differ from the secondary evidence which he gives with respect to the instrument itself. The law, in such a case, requires the original itself to be produced. Although it be the general rule of law, that the best evidence is to be produced, yet that rule is not to be taken literally, for, with respect to evidence of a person holding an office, such as that of constable, it is not necessary to produce the actual appointment. It is sufficient to shew, that he is in the exercise of the office. So *also, in the case of rectors and vicars sued for non-residence, it is sufficient to shew, that they have done some of the acts which such persons are required to do. It seems to me, therefore, that this being a useless instrument, where the particular terms of the instrument are immaterial, the party cannot be presumed to have any improper purpose in resorting to secondary evidence. Then, as to the search for the paper, I think, for the reasons stated by the Court, that sufficient was done to entitle the party to give secondary evidence.

BREWSTER
v.
SEWELL.

[*303]

BEST, J. :

I am of the same opinion. It is very difficult to lay down any general rule as to the degree of diligence necessary to be used in searching for an original document, to entitle the party to give secondary evidence of its contents. That must depend, in a great measure, upon the circumstances of each particular case. If a paper be of considerable value, or if there be reason to

BREWSTER
v.
SEWELL.

[*304]

suspect that the party not producing it has a strong interest which would induce him to withhold it, a very strict examination would properly be required; but if a paper be utterly useless, and the party could not have any interest in keeping it back, a much less strict search would be necessary to let in parol evidence of its contents. It seems to me, however, in this case, that sufficient diligence was used. Here the plaintiff brings an action for a libel, charging him with having defrauded the insurance office. The material fact to be inquired into is, has he cheated the insurance office? And in order to shew that he has not, it is necessary, framed as the pleadings are, to produce the policy. The plaintiff could have no possible interest in keeping it back, because one of the defendants *being one of the committee of the society with whom the insurance was effected, he had the means of knowing every thing about it, and of bringing forward a copy of the original. I think, therefore, that there was abundant proof of search to let in the secondary evidence; and therefore this rule must be made absolute.

Rule absolute.

1820,
Jan. 24.
[304]

ILOTT v. WILKES.†

(3 Barn. & Ald. 304—320.)

A trespasser, having knowledge that there are spring-guns in a wood, although he may be ignorant of the particular spots where they are placed, cannot maintain an action for an injury received in consequence of his accidentally treading on the latent wire communicating with the gun, and thereby letting it off.

DECLARATION stated that defendant was possessed of a wood called Chrishall Wood, in the county of Essex, over and along a certain part of which there was a right of way for all the King's

† The setting of spring-guns in a wood is now clearly illegal, by express statute, 24 & 25 Vict. c. 100, re-enacting 7 & 8 Geo. IV. c. 18. But this does not seem to affect the *ratio decidendi* of this case, though the recurrence of the circumstances may

be unlikely. At all events it is impossible to ignore the arguments or the decision. See the case referred to in the judgment in *Clark v. Chambers* (1878) 3 Q. B. D. 327, 331; 47 L. J. Q. B. 427. And see Pollock on Torts, 4th ed. p. 151.—R.C.

subjects on foot, in the day and at other times; and that defendant, before the committing of the grievances, had set a certain spring-gun, charged with gunpowder and leaden shot, in a certain part of said wood and premises, near those parts over which the right of way extended, with a certain wire communicating with the lock and other parts of the said spring-gun, by the treading on or touching of which wire, the said gun could be let off and fired, with intent to lacerate, wound, and injure persons coming into that part of the wood where the gun was set and placed; and that the wire was laid across in the day time as well as the night time; and that it was the duty of the defendant not to have permitted the said gun to remain so loaded and charged, and with the said wire communicating with the lock and other parts thereof, without causing notice to be given to persons passing along the said *wood in the day time, of the said gun being so situate and placed, and of the direction and place where the said wire so communicating with the lock and other parts thereof, was placed, in order to prevent persons through ignorance treading on or touching the wire so communicating with the lock, and thereby letting off the gun and being injured by the discharge; that defendant wilfully, negligently, and with the intent aforesaid, permitted the said gun to remain in a part of the wood, loaded, &c. with the wire communicating, &c. without giving notice to persons passing along the wood in the day time, of the direction or places in which the wire communicating with the lock was placed or laid, by means whereof plaintiff, being in the said part of the wood in the day time, and not having any knowledge, notice, or warning of the place or direction where the wire communicating, &c. was laid or placed, trod upon and touched the wire communicating with the lock, and by reason thereof the gun went off and discharged several shot, and plaintiff was thereby injured. The second and third counts did not differ substantially from the first. The fourth count charged, that defendant suffered the spring-guns to remain loaded in the wood, &c. without taking due and proper means to prevent persons in the wood from being injured thereby, by reason whereof plaintiff was injured. The fifth count stated, that the defendant knowingly, wrongfully, and unlawfully

ILOTT
*
WILKES.

[*305]

ILOTT
v.
WILKES.

[*306]

permitted a spring-gun, loaded, &c. to remain so loaded, &c. by means whereof plaintiff, not knowing, and not being able to perceive where the wire was placed, in the day time unavoidably trod upon the wire, by which the gun was fired, &c. The sixth count charged the *defendant with having unlawfully placed the guns in the wood, without any sufficient or legal notice to his Majesty's subjects; and that plaintiff, being a liege subject, and not being able to perceive where the gun or spring-wire was, did, unknowingly, for want of sufficient legal notice, tread upon the wire, &c. The seventh count stated, that defendant, wrongfully and maliciously, placed in certain lands a spring-gun, loaded, &c.; and that plaintiff, in walking and passing along the said land, unknowingly trod upon the wire, &c. Plea, not guilty. At the trial before GARROW, B. at the last Summer Assizes for the county of Essex, the following facts were given in evidence: The defendant was the owner of Chrishall Wood, consisting of fifty or sixty acres; and by his order, nine or ten spring-guns were set there. Several boards were affixed, containing notice to the public that such instruments were so placed. There formerly had been a path on the outside of the wood, but it had not been used for some years. The plaintiff, on the occasion in question, accompanied by another person, went out in the day time for the purpose of gathering nuts, and proposed to his companion to enter Chrishall Wood. The latter however refused, unless the plaintiff would go first; and he then told plaintiff that spring-guns were set there. They both however entered the wood, and the plaintiff received the injury which was the subject of the action, in consequence of treading on the wire communicating with the spring-gun. Upon these facts, the learned Judge, considering that this involved the same question which was under the consideration of the Court of Common Pleas, in *Deane v. Clayton*,† directed the jury to find a *verdict for the plaintiff, and reserved to the defendant liberty to move to enter a nonsuit. The jury assessed the damages at 50*l.*; and found, that at the time of the injury, there was not any footpath near the place in question; that the plaintiff was not in the exercise of any right of path, but was gathering nuts; and that he had

[*307]

† 18 R. B. 553 (7 Taunt. 489; 2 Marsh. 577; 1 Moore, 203).

knowledge and notice that spring-guns were placed in the wood. And a rule *nisi* for entering a nonsuit having been obtained in last Michaelmas Term,

LOTT
v.
WILKES.

Adolphus, Dowling, and Chitty, shewed cause :

In this case, the defendant, if present, would not have been justified in shooting a mere trespasser: he could only use as much force as was necessary to prevent the trespass, or its continuance. If that be so, the maxim of law applies here, that a man shall not do indirectly that which he cannot do directly. The circumstance of the plaintiff's having notice that the guns were fixed in this wood, can make no difference; for, if the defendant had himself stood at the entrance with a loaded gun, and given notice to a trespasser that he would shoot at him if he entered, such an act would not therefore be justifiable. If, indeed, the notice had pointed out the particular spot where the wire communicating with the gun was placed, and the trespasser had gone to that spot where the danger was inevitable, and trod upon the wire, the firing off the gun would have been his own act, and not the act of the person who placed it there; but where a party enters upon a space of sixty acres, knowing only that some spring guns are there placed, he does so with a well-grounded expectation that he may avoid a partial danger. The firing off the gun, in such a case, by the accidental *treading on a latent wire, cannot be considered as his act. This forms a distinction between this case and that of a trespasser climbing a wall, on the top of which are fixed spikes or broken glass. There he knows that he must, in every part, meet with the instrument of mischief. In this case it is possible that he may meet with it, but it is probable that he may not. The immediate cause of the mischief here is latent. The case of a ferocious dog kept for the protection of property, is distinguishable on this ground, that the dog is capable of moving to any part of the premises, and therefore may be considered as present in every part; and therefore, the danger, in that case, is inevitable. In *Jay v. Whitfield*, tried before RICHARDS, C. B. at the Warwick Summer Assizes, 1817, the plaintiff, a boy, having entered the defendant's premises for the purpose of cutting a stick, was shot

[*308]

LOTT
v.
WILKES.

by a spring-gun, for which injury he recovered 120*l.* damages, and no attempt was afterwards made to set aside that verdict. In *Deane v. Clayton*,† the Court of Common Pleas were equally divided upon the general question. Upon that it is sufficient to say, that the law has assigned certain specific remedies for the protection of property; and even if they were insufficient, it is not competent to an individual to have recourse to a contrivance, the effect of which may be to inflict wounds, or even death, upon a mere trespasser.

ABBOTT, Ch. J. :

[*309]

We are not called upon in this case to decide the general question, whether a trespasser sustaining an injury from a latent engine of mischief, placed in a wood or in grounds where he had no *reason to apprehend personal danger, may or may not maintain an action. That question has been the subject of much discussion in the Court of Common Pleas, and great difference of opinion has prevailed in the minds of the learned judges, whose attention was there called to it. Nor are we called upon to pronounce any opinion as to the inhumanity of the practice, which in this case has been the cause of the injury sustained by the plaintiff. That practice has prevailed extensively and for a long period of time, and although undoubtedly I have formed an opinion as to its inhumanity, yet at the same time I cannot but admit that repeated and increasing acts of aggression to property may perhaps reasonably call for increased means of defence and protection. I believe that many persons who cause engines of this description to be placed in their grounds do not do so with the intention of injuring any one, but really believe that the notices they give of such engines being there, will prevent any injury from occurring, and that no person who sees the notice will be weak and foolish enough to expose himself to the perilous consequences likely to ensue from his trespass. In this case it is found by the jury that the plaintiff actually knew that spring-guns were set in this wood. Now, sitting in a court of law, we cannot say that an action may be maintained against the defendant for doing an act like the one

† 18 R. B. 553 (7 Taunt. 489; 2 Marsh. 577; 1 Moore, 203).

in question, if it be not in itself unlawful. The jury have found that the plaintiff (before he entered the wood) knew that engines like that by which he suffered in consequence of his trespass were placed there; to him, therefore, they ceased to be latent engines of mischief; and the degree of injury sustained *cannot vary the case in principle. The Court, therefore, cannot hold that this action is maintainable, unless they are also prepared to say, that any trespasser who should hurt himself by coming in contact, in the dark, with spikes or broken glass stuck on a wall, which at that time would be invisible, could maintain an action against the owners, in a case where it appeared that he had had a previous opportunity of observing in broad day-light that such means of mischief were placed upon the wall. But in that case I believe no lawyer will argue that an action could be maintained. I am not able to distinguish this case from that which I have put. Considering the present action merely on the ground of notice, and leaving untouched the general question as to the liability incurred by placing such engines as these where no notice is brought home to the party injured, I am of opinion that this action cannot be maintained.

ILOTT
v.
WILKES.

[*310]

BAYLEY, J. :

Nothing that falls from me shall have a tendency to encourage the practice which, to a certain extent, has prevailed, of setting these engines for the protection of property, the consequence of which sometimes has been to cause great bodily injury to persons entirely ignorant of the existence of engines of this description. Such instruments may be undoubtedly placed without any intention of doing injury, and for the mere purpose of protecting property by means of terror; and it is extremely probable that the defendant in this case will feel as much regret as any man for the injury which the plaintiff has sustained, and that he will render to the party as much compensation as he ought, without compromising the question of law, and without admitting *it as a matter of obligation upon him, that he is bound to make a compensation for the injury through the medium of a suit at law. This is a case in which the plaintiff had notice that there were spring-guns in the wood. The declaration states that the

[*311]

LOTT
v.
WILKES.

[*312]

plaintiff had no notice of the places or of the direction in which the guns themselves were placed, or where the wires communicating with the guns were placed; but it is not necessary to give notice to the public that guns are placed in such particular spots in such particular fields; for that would deprive the property of the intended protection. It is sufficient for a party generally to say, "There are spring-guns in this wood;" and if another then takes upon himself to go into the wood, knowing that he is in the hazard of meeting with the injury which the guns are calculated to produce, it seems to me that he does it at his own peril, and must take the consequences of his own act. The maxim of law, *volenti non fit injuria*, applies; for he voluntarily exposes himself to the mischief which has happened. He is told that if he goes into the wood he will run a particular risk, for that in those grounds there are spring-guns. Notwithstanding that caution, he says, "I will go into the wood, and I will run the risk of all consequences." Has he then any right, after he has been distinctly apprised of his danger, to bring an action against the owner of the soil for the consequences of his own imprudent and unlawful act? I think not, for he had no right to enter the wood; and, in so doing, he became a trespasser and a wrongdoer. It has been said that these guns were wrongfully and unlawfully placed in the wood. Now let us inquire whether it was unlawful or not; one of the tests of trying that question is this: Does the law punish a man *for the mere act of putting these instruments upon his own premises? Is he indictable for it? For that is the criterion by which we are to judge of the legality of this act. If it could be made out as an abstract position of law, that the defendant is liable to be indicted for setting spring-guns in his premises, then, perhaps, whether he puts up notices or not, he might not have any defence; for, notwithstanding the notices, he would be liable for the consequences of an unlawful act. But if it cannot be shewn that it is an unlawful act to set these spring-guns, it seems to me that the defendant was at liberty to do it. At the same time he would be liable for a civil injury produced from want of caution on his part to guard against such an injury; for although it may be lawful to put these instruments on a man's own ground, yet

ILOTT
v.
WILKES.

as they are calculated to produce great bodily injury to innocent persons (for many trespassers are comparatively innocent) it is necessary to give as much notice to the public as you can, so as to put people on their guard against the danger. This declaration is founded upon the ground, that such is the law upon the subject; for the first count states, that the defendant set the guns there without giving notice of their place and direction. Then another count states, that the guns were set there without giving proper notice where the wires which communicated with the guns were placed. Another count states, that they were placed without sufficient and proper notice to all his Majesty's subjects. The declaration, therefore, assumes the law to be, not that the mere act of placing these guns in a man's own ground is illegal and punishable by indictment, but that a party doing that act may be liable to an action, provided he does not take *due and proper means, by giving notice, to prevent the injury which those engines are calculated to produce. Where a man, however, is actually apprised before he enters that the guns are there, he cannot afterwards complain that there has not been a proper and sufficient notice given. The case of a man keeping on his own premises a furious dog, or bull, is to a certain degree analogous to this. Suppose such a person were to give a notice that in his premises there is a furious bull, and that it is dangerous for any person to enter, and a wrong-doer, who had read this notice, enters, and the bull attacks him, it is clear that he could maintain no action for the consequences of his own act. So, also, if a trespasser enters into the yard of another, over the entrance to which notice is given, that there is a furious dog loose, and that it is dangerous for any person to enter in without one of the servants or the owner. If the wrong-doer, having read that notice, and knowing, therefore, that he is likely to be injured, in the absence of the owner enters the yard, and is worried by the dog, (which in such a case would be a mere engine without discretion,) it is clear that the party could not maintain any action for the injury sustained by the dog, because the answer would be, as in this case, that he could not have a remedy for an injury which he had voluntarily incurred. If,

[*313]

LOTT
v.
WILKER.

indeed, the master had been upon the spot at the time, and had seen the dog running towards the man, it would have been his duty to have done all in his power to prevent the animal from worrying him, and if he had not so done, the party injured might have had a right of action. I am, therefore, of opinion, on the ground of notice only, that this action is not maintainable.

[314] HOLBOYD, J. :

I am of opinion that this action is not maintainable, on the ground that the plaintiff had notice that the spring-guns were placed in the wood in question. I do not consider it necessary that he should have notice of the precise spot in which the spring-guns were placed. It is sufficient, in the present case, that he had notice generally that they were placed in the ground in question. The mere act of placing spring-guns in a man's own ground is not of itself unlawful. It is not an indictable offence, nor will it subject a party to an action, unless some injurious consequences result from it. If any such consequences result, it may perhaps form the subject of an action. Without giving any decided opinion upon that point, but assuming, for the present, that that would be so, it seems to me that a party having express notice that the spring-guns were placed in a particular ground, and entering upon that place as a trespasser, stands in a very different situation ; for if the placing of the spring-guns be not of itself an unlawful act, and only becomes so in respect of the consequences which result from it, the party who so enters, with full knowledge of the danger, is himself the cause of the mischief that ensues, and falls within the principle of law, *volenti non fit injuria* ; for as he knew that the spring-guns were placed there, he can have no right of action for an injury which resulted from his own act alone. The only doubt which I have entertained during the course of the argument arises out of that maxim of law, that a man cannot do that indirectly which he cannot do directly. I am now, however, satisfied, that that principle has no application to the present case, where the plaintiff had express notice that the spring-guns were placed on the premises into which he wrongfully entered ; for in that *case the act of firing off the gun, which was the cause of the injury, was

[*315]

ILOTT
v.
WILKES.

his act, and not the act of the person who placed the gun there. If, indeed, a party who had no notice, had gone into the grounds, although he would be a trespasser, the act of firing off the gun, by treading accidentally on the wires, would not, in consequence of those wires being latent, be considered his own act; but he would be a mere instrument of producing that which resulted from a prior act done by another. If one person makes use of another, who is a mere instrument, to do any act, the thing done is the act, not of him who is merely the instrument, but of the person who uses him as such instrument. Thus, if a man induces a madman to inflict wounds upon the person of another from which death ensues, in point of law, that is not considered the act of the madman, but the act of the person inciting him. The madman is considered a mere instrument, and the other person, though not present at the time of the act done, is indictable for murder as a principal (although, generally speaking, to make a person a principal in murder he must be present at the time); the reason of which is, that the act done is considered as the act of the person who causes it, and he is considered as virtually present at the time of doing it, and the madman as a mere instrument in his hands. So it is in a case where one person secretly mixes poison with food, for the purpose of the poison being ignorantly taken in the food by another. Now, in the present case, in order to make the firing off of this gun the act of the person who placed it there, we must consider him as doing indirectly the same thing as if he had taken up the gun at the time and shot the plaintiff; and we must consider the latter as a mere instrument, and not as an actor; but, in my opinion, the plaintiff in this case was not an instrument, but an actor. If he had seen the wires and trod on them with the intention of firing off the gun, it is clear that that would have been his own act. Here, he entered the wood with full notice that those engines were placed there, and with the knowledge, therefore, that the danger was unavoidable. So far as he was concerned, the cause of the mischief could not be considered as latent, and the act of letting off the gun, which was the consequence of his treading on the wire, must be considered wholly as his act, and not the act of the person who placed the gun there. If, indeed, the

[*316]

ILOTT
v.
WILKES.

defendant had been present, and had seen a trespasser enter, and had the means of preventing the injury, and had not done all in his power to prevent it, unquestionably it might have been considered as proceeding from his own act; but in the present case he was absent, and had not the means of averting the mischief; and therefore the maxim of law, that a man cannot do that indirectly which he cannot do directly, is not applicable to the present case. Indeed, that maxim would equally apply to a case where a person kept a ferocious bull in his grounds, where other persons were used to resort.† In such a case, if there was no notice, and a trespasser was to enter and be gored, an action would lie for the injury; but if public notice were given, and it could be shewn that the trespasser knew that such a dangerous animal was there, and with that knowledge was hardy enough to run the risk, it is perfectly clear that he could support no action. I am, therefore, of opinion that this action is not maintainable, on the ground that the damage sustained has been produced by the plaintiff's own wilful act.

[317] BEST, J. :

The act of the plaintiff could only occasion mere nominal damage to the wood of the defendant. The injury that the plaintiff's trespass has brought upon himself is extremely severe. In such a case, one cannot, without pain, decide against the action. But we must not allow our feelings to induce us to lose sight of the principles which are essential to the rights of property. The prevention of intrusion upon property is one of these rights, and every proprietor is allowed to use the force that is *absolutely* necessary to vindicate it. If he uses more force than is *absolutely* necessary, he renders himself responsible for all the consequences of the excess. Thus, if a man comes on my land, I cannot lay hands on him to remove him, until I have desired him to go off. If he will not depart on request, I cannot proceed immediately to beat him, but must endeavour to push him off. If he is too powerful for me, I cannot use a dangerous weapon, but must first call in aid other assistance. I am speaking of outdoor property, and of cases in which no felony is to be appre-

† See *Brock v. Copeland*, 5 R. R. 730 (1 Esp. 203).

ILOTT
v.
WILKES.

hended. It is evident, also, that this doctrine is only applicable to trespasses committed in the presence of the owner of the property trespassed on. When the owner and his servants are absent at the time of the trespass, it can only be repelled by the terror of spring-guns, or other instruments of the same kind. There is, in such cases, no possibility of proportioning the resisting force to the obstinacy and violence of the trespasser, as the owner of the close may and is required to do where he is present. There is no distinction between the mode of defence of one species of outdoor property and another (except in cases where the taking or breaking into the property amounts to felony). If *the owner of woods cannot set spring-guns in his woods, the owner of an orchard, or of a field with potatoes or turnips, or any other crop usually the object of plunder, cannot set them in such field. How then are these kinds of property to be protected, at a distance from the residence of the owner, in the night, and in the absence of his servants? It has been said, that the law has provided remedies for any injuries to such things by action. But the offender must be detected before he can be subjected to an action, and the expense of continual watching for this purpose would often exceed the value of the property to be protected. If we look at the subject in this point of view, we may find, amongst poor tenants, who are prevented from paying their rents by the plunder of their crops, men who are more objects of our compassion, than the wanton trespasser, who brings on himself the injury which he suffers. If an owner of a close cannot set spring-guns, he cannot put glass bottles or spikes on the top of a wall, or even have a savage dog, to prevent persons from entering his yard. It has been said in argument, that you may see the glass bottles or spikes; and it is admitted, that if the exact spot where these guns are set, was pointed out to the trespasser, he could not maintain any action for the injury he received from one of them. As to seeing the glass bottles or spikes, that must depend on the circumstance whether it be light or dark at the time of the trespass. But what difference does it make, whether the trespasser be told the gun is set in such a spot, or that there are guns in different parts of such a field, if he has no right to go on any part of that field? It is absurd to say you may set the guns, provided

[*318]

ILOTT
v.
WILKES.
[*319]

you tell *the trespasser exactly where they are set, because then the setting them could answer no purpose. My brother BAYLEY has illustrated this case by the question which he asked, namely, can you indict a man for putting spring-guns in his inclosed field? I think the question put by GIBBS, Ch. J. in the case in the Common Pleas, a still better illustration, viz. can you justify entering into inclosed lands, to take away guns so set? If both these questions must be answered in the negative, it cannot be unlawful to set spring-guns in an inclosed field, at a distance from any road, giving such notice that they are set, as to render it, in the highest degree, probable, that all persons in the neighbourhood must know that they are so set. Humanity requires that the fullest notice possible should be given, and the law of England will not sanction what is inconsistent with humanity. It has been said, in argument, that it is a principle of law, that you cannot do, indirectly, what you are not permitted to do directly. This principle is not applicable to the case. You cannot shoot a man that comes on your land, because you may turn him off by means less hurtful to him; and, therefore, if you saw him walking in your field, and were to invite him to proceed on his walk, knowing that he must tread on a wire, and so shoot himself with a spring-gun, you would be liable to all the consequences that would follow. The invitation to him to pursue his walk is doing indirectly what, by drawing the trigger of a gun with your own hand, is done directly. But the case is just the reverse; if, instead of inviting him to walk on your land, you tell him to keep off, and warn him of what will follow if he does not. It is also said, that it is a maxim of law,

[*320]

that you must so use *your own property as not to injure another's. This maxim I admit, but I deny its application to the case of a man who comes to trespass on my property. It applies only to cases where a man has only a transient property, such as in the air or water, that passes over his land, and which he must not corrupt by nuisance; or where a man has a qualified property, as in land near another's ancient windows, or in land over which another has a right of way. In the first case, he must do nothing on his land to stop the light of the windows, or in the second, to obstruct the way. This case has been argued,

as if it appeared in it, that the guns were set to preserve game, but that is not so; they were set to prevent trespasses on the lands of the defendant. Without, however, saying in whom the property of game is vested, I say, that a man has a right to keep persons off his lands, in order to preserve the game. Much money is expended in the protection of game, and it would be hard if, in one night when the keepers are absent, a gang of poachers might destroy what has been kept at so much cost. If you do not allow men of landed estates to preserve their game, you will not prevail on them to reside in the country. Their poor neighbours will thus lose their protection and kind offices; and the Government, the support that it derives from an independent, enlightened, and unpaid magistracy.

ILOTT
v.
WILKES.

Rule absolute.

Marryat then stated, that the defendant waived all claim to costs.

DOE, ON THE DEMISE OF BINGHAM AND OTHERS v.
CARTWRIGHT.

(3 Barn. & Ald. 326—327.)

1820,
Jan. 24.
[326]

Where, upon the letting of premises to a tenant, a memorandum of agreement was drawn up, the terms of which were read over and assented to by him, and it was then agreed that he should, on a future day, bring a surety and sign the agreement, neither of which he ever did: Held, that the memorandum was not an agreement, but a mere unaccepted proposal, and that the terms of the letting, therefore, might be proved by parol evidence.

THIS was an ejectment, tried before Richardson, J. at the last assizes for the county of Worcester. The bailiff proved, that on Lady Day, 1818, he agreed that the land in question should be let to the defendant, and that he should sign an agreement with a surety. A memorandum of agreement was drawn up: the terms were read over to the defendant, and he *assented to them. However, he never signed the agreement, or brought any surety. A notice to quit was served before Midsummer Day, 1818, to quit at the Lady Day following. It

[*327]

DOE
v.
CAET-
WRIGHT.

was objected, that the terms of the tenancy, the time at which it was to commence and end, ought to be proved by the written memorandum, drawn up by the witness, and assented to by the defendant. The learned Judge was of that opinion, and non-suited the plaintiff; but reserved liberty to move to enter a verdict. A rule *nisi* having been obtained for that purpose in last Michaelmas Term,

W. E. Taunton now shewed cause. * * *

ABBOTT, Ch. J. :

I think, that in this case, there never existed any written agreement between the parties. The paper referred to at the trial would not become an agreement, till the defendant had brought a surety and executed it. It contained a mere proposal; and, upon the evidence, it appears to have been an unaccepted proposal. The defendant might have been turned out of the premises without any notice to quit; and there could, therefore, be no necessity for producing this memorandum.

Rule absolute.

Puller and *Campbell* were in support of the rule.

1820.
Jan. 24.
[330]

SARAH PARTON *v.* JOSEPH WILLIAMS, JOHN
PHIPPS, BENJAMIN GOUGH, AND RICHARD
COOPER.

(3 Barn. & Ald. 330—341.)

A constable acting under a warrant commanding him to take the goods of A. takes the goods of B., believing them to belong to A. : Held, that he was entitled to the protection of the statute 24 Geo. II. c. 44, s. 8,† and that an action against him must be brought within six calendar months.

TRESPASS for taking plaintiff's goods and chattels: Plea, not guilty. At the trial before Richardson, J. at the last Salop Assizes, the material question of fact was, whether the property

† And see now the Public Authorities Protection Act, 1893.

PARTON
v.
WILLIAMS.

seized, which was the stock of a farm at Little Wenlock, belonged to the plaintiff, who was the widow of a former lessee, or to William Parton, her eldest son. The jury, after much contradictory evidence, found a verdict for the plaintiff. It appeared that William Parton, having served the office of overseer, was 139*l.* in arrear, upon the balance of accounts. The two first-named defendants, Williams and Phipps, were the succeeding overseers. The goods in question were seized in September, 1816, under a warrant of distress issued by two justices. The defendant Gough was constable of Little Wenlock, and the defendant Cooper acted in aid of the other three. It was objected at the trial, that the action could not be supported: first, because it had not been brought within six calendar months after the act committed; and secondly, because there had not been any previous demand of a copy of the warrant. The learned Judge reserved these points; and in last Michaelmas Term, a rule *nisi* for entering a nonsuit was obtained on the former ground only, the Court being clearly of opinion, that the constable, not having acted in obedience to the warrant, which directed him to *take the goods of William Parton only, the magistrate could not be responsible, and therefore there was no necessity for demanding a copy of the warrant.

[*331]

Jervis, W. E. Taunton, and Puller, now shewed cause.

* * *

Pearson and Campbell, contrà, were stopped by the Court.

[332]

ABBOTT, Ch. J. :

The Legislature manifestly had very different objects in view in the 6th and 8th sections of the statute upon which the present question arises. By the common law, an officer who merely executed the warrant of a magistrate, was answerable for the consequences, if the magistrate acted without authority. One object, therefore, of the Legislature was to relieve the officer from that inconvenience, and to provide *that if he acted in obedience to the warrant of the magistrate, he should be protected. That was the object of the 6th section, which makes it

[333]

PARTON
v.
WILLIAMS.

necessary to demand a copy of the warrant from the officer before he can be sued. If he gives that copy, although the party may be entitled to an action against the magistrate, yet, if he joins the officer in it, the production of the warrant will be a protection to the latter, and will entitle him to a verdict. The 6th section is, therefore, obviously intended to protect the officer in those cases only where the justice remains liable. And it is necessary, in order to bring the officer within it, that he should act most strictly in obedience to his warrant. And in that case the statute gives him an absolute protection at whatever time the suit may be brought against him. To give him any further protection, when he has so acted, does appear to me to be wholly useless. For I cannot understand why a limitation of time is to be imposed upon any action which the Legislature has declared not to be maintainable at all. The 8th section must, therefore, have a very different object in view. It enacts "that no action shall be brought against any justice of the peace for any thing done in the execution of his office, or against any constable, headborough, or other officer or person, acting as aforesaid, unless within six calendar months after the act committed." The justice, therefore, is protected absolutely, unless the action be brought within that period of time; he has the benefit of that statutable limitation for whatever he may do in the execution of his office, although he may do something not authorised by law. This provision, therefore, is evidently intended for the benefit of persons who intend to act right, but by mistake *act wrong. The section then proceeds to state, "or against any constable, headborough, or other officer or person, *acting as aforesaid.*" And it has been argued that these latter words imply that the officer must be acting in obedience to the warrant to be entitled to the protection. But I am of opinion that they are to be taken as equivalent to those words of the 6th section, "acting by his order and in his aid." In which case they are coupled with the antecedent word "person" alone. I have already assigned the reasons which induce me to think that this provision cannot be confined to cases within the protection of the 6th section. It may, perhaps, be too much to say that it will apply in all cases where the officer may have

[*334]

PARTON
v.
WILLIAMS.

acted in what he may have supposed to have been the due execution of his duty. It is, however, unnecessary to decide that point here. Nor is it necessary to pronounce any opinion upon the case of *Postlethwaite v. Gibson*,† where Lord KENYON thought that unless the officer had a warrant, he was not protected by the 8th section. If it were necessary to determine whether a constable, who without a warrant acts in the execution of his office, and in the discharge of his ordinary duty, be entitled to the protection of this statute, I should wish for further time to consider of it. But in *Postlethwaite v. Gibson* the constable was not acting in the execution of his ordinary duty; for it is no part of that duty to arrest a man for a felony, upon the order of a private individual. Any person who is not a constable may equally do it; but both do it at their peril. If it turn out that the party arrested has committed a felony, then they are justified. Here, however, the constable had a warrant, directing him to take the goods of William Parton. He went to the *house where he really supposed those goods were to be found, and it occupied a jury a very considerable time to decide whether he was mistaken or not; he meant, therefore, to obey the warrant; and, as far as he was concerned, he was acting *bonâ fide* in obedience to it. It afterwards, however, turned out that the goods belonged to the plaintiff; and, therefore, he was not obeying the warrant of the justice so as to make the justice responsible. As I consider, however, that the 8th section was intended to give a benefit in addition to that given by the 6th section, it appears to me that this case falls within it. And I think, also, that the officer, as far as regards himself, and as far as regards the law which protected him, may be considered as having acted *bonâ fide* in obedience to the warrant which he had received. This action ought, therefore, to have been brought within the period of six months. And the rule for entering a nonsuit must be made absolute.

[*335]

BAYLEY, J. :

When a constable is acting *bonâ fide*, and with an honest opinion that he is discharging his duty, and that he is acting at

† 3 Esp. 226.

PARTON
 WILLIAMS.

the very time in obedience to the warrant of a magistrate, I am of opinion that he is entitled to the protection of the 8th section of the statute. The 6th and 8th sections contain provisions of a very different kind. The 8th section was intended to give a protection to the constable, which he was not entitled to by the 6th; and the Court, therefore, are authorized to lay out of their consideration the cases of *Money v. Leach*,† and *Milton v. Green*.‡ The 6th section is shortly this: if the act done be in obedience to the warrant, it is identified with that of the justice, and he alone shall be responsible for it. If a *copy of the warrant is given, the justice may be made either a sole defendant or a co-defendant; but the party can only recover against the justice. That section must of necessity, therefore, be confined to that description of cases in which the constable acts strictly within the limits of the authority communicated to him by the magistrate; in which case, if the action is maintainable at all it is maintainable against the justice. If an officer, therefore, confines himself within the limits of the warrant, he has an effectual protection under the 6th section. There could then be no reason for providing that an action, in which the defendant is not liable at all, should be brought within a limited time. The 8th section was intended to give a protection to the justice, and also to the constable and officers where they or any of them have acted beyond the extent of their duty; and it provides that all actions shall be brought within six months, in order that the matter shall be tried promptly after the transaction has occurred, and when the circumstances are fresh in the recollection of witnesses. The words of that section are, “that no action shall be brought against any justice of the peace for any thing done in the execution of his office.” Now similar words are used in the first section of the Act, which provides “that no writ shall be sued out against a justice for any thing done by him in the execution of his office, unless notice in writing be given.” That section has been held to extend to cases where the justice has honestly and *bonâ fide* supposed that he was acting in the execution of his office, but has in fact exceeded his authority. I remember a case where an action was brought against a magistrate who had

[*336]

† 3 Burr. 1742.

‡ 5 East, 233, 1 Smith, 402.

seized a horse and cart, on the *ground that the driver was riding on the shafts in the King's highway. It turned out, however, that the cart was standing still at the time he was on the shafts; and the Court were of opinion that he could not be considered as riding on the shafts within the meaning of the Act of Parliament. An action was then brought against the magistrate, but no previous notice was given, and the Court were of opinion that as the magistrate *bonâ fide* believed that he was in the execution of his duty, he was within the protection of the first section; and *Weller v. Toke* † is an authority to the same effect. Inasmuch, therefore, as the same words used in the former part of this Act of Parliament have been held to give to a magistrate who really believed that he was acting in the execution of his duty, but in fact was acting illegally, the protection intended by the Legislature, they must have the same meaning in this section. And if the justice be protected, the Legislature must have intended to give equal protection to the constable and officers; for it is but just that where any injury is said to be committed by a person upon whom the law casts a burdensome office, that he should be called upon to answer for it within a reasonable time. In *Postlethwaite v. Gibson* ‡ the opinion intimated by Lord KENYON does not go to an extent materially to benefit the plaintiff in this case. All that Lord KENYON could be understood to have said is this, that inasmuch as the defendant had not a warrant, and as he was not acting on his own view, he was not acting in his character of a constable; and, therefore, was not entitled to the protection of the 8th section of the Act. That *also was a mere *Nisi Prius* decision, and the plaintiff was ultimately nonsuited; so that there was no opportunity of bringing the question before the Court. For these reasons, it appears to me that the officer is entitled to the protection of this section of the statute, provided he acts *bonâ fide* in his character of officer, and under a belief that he is discharging the duty with which he is invested; and I, therefore, think that this rule must be made absolute.

PARTON
v.
WILLIAMS.
[*337]

[*338]

† 9 East, 364. (See the case *Evelyn*, 3 R. R. 355.)
shortly stated in note to *Briggs v.* ‡ 3 Esp. 226.

PARTON
v.
WILLIAMS

HOLROYD, J. :

The words of the 8th section ought not, as it appears to me, to receive the construction which has rightly been given to the 6th section ; because there are words in the section upon which that confined construction depends which are not to be found in the 8th. The words of the latter section are general with respect to all actions brought against constables, head-boroughs, other officers, and persons acting as aforesaid ; that is to say, persons acting in their aid : for that is the construction which I give to those words. The actions, therefore, are not confined to actions for things done in obedience to a warrant ; for the words do not specify for what they shall be brought, but only that no action shall be brought against the constable, unless commenced within six calendar months. That part of the clause, indeed, which relates to actions against justices, does specify for what the action shall be brought, viz. for any thing done by them in the execution of their office ; but it does not go on to say that the act done by the constable must be an act done by him in the execution of his office, or in obedience to a warrant. It is true that the words used may be narrowed by the general intent of the statute. [*339] *But, unless that general intent be quite manifest, we cannot construe them as if the words "in obedience to the warrant," &c. had been inserted. Now, considering the 6th section with reference to the law as it stood previously to the passing of this Act, it is clear that it could not be the intention of the Legislature to confine the protection of the 8th to those cases only where the officer acted strictly in obedience to his warrant. At common law, public officers were bound to execute a magistrate's warrant, provided it was within the magistrate's jurisdiction, and he had authority to grant it in the form in which it was granted. Nice questions, however, sometimes arose upon the validity of the warrants, and upon the particular form of words in which they were framed. When the magistrate had no authority to grant a warrant in the particular form in which it was granted, it was hard upon the officer that he should be answerable in damages, when the warrant did not give him a legal authority. This statute, therefore, provided that the remedy in such a case should be against the magistrate only.

PARTON
v.
WILLIAMS.

The 6th section did not mean to take away from any person injured by an unlawful warrant the remedy for that injury, but merely exempts the officer from responsibility, if he acts in obedience to the warrant. But the magistrate never was responsible for the mistake of the officer, when he went beyond the authority given by the warrant. This reasoning, however, does not apply to the 8th section; for that section manifestly applies to the case of a magistrate where he would be liable for what he had done, and yet the action against him must be brought within six months. The same reason seems to apply to the case of an officer who is acting in execution *of his warrant, though not in strict obedience to it. The intention of the Legislature must have been, that both the constable and the justice of the peace should be in the same situation with respect to the time in which such action should be brought against them.

[*340]

BEST, J.:

I think that the present defendant is entitled to the protection given by the 8th section of the statute. It is entitled, "An Act for the rendering justices more safe in the execution of their office, and for indemnifying constables and others acting in obedience to their warrants;" and then the preamble proceeds to state what sort of protection shall be extended to them. It draws the line between those cases where they have wantonly exceeded their authority, and others where they have done so without intending it. It gives a different sort of protection to magistrates from that which it does to officers: the former are to have notice given them, in order that if they have erred they may tender amends. Constables, however, are not bound to act, except under the authority of a magistrate, unless the peace be broken in their view. The nature of their duty being different from that of a magistrate, this Act of Parliament was intended to give them complete protection. Now, when a constable acts strictly in obedience to the warrant, he is completely protected by the 6th section; but as it is fit that he should also, in cases where he acts *bonâ fide* but not strictly according to his warrant be protected like the magistrate who acts *bonâ fide* but beyond the extent of his jurisdiction, the 8th section extends that protection

PARTON
 *
 WILLIAMS.
 [341]

to him. If that were not so, the magistrate *would be protected, whilst the more ignorant constable, acting under a mistake, would have no protection at all. The words "acting as aforesaid," in the 8th section, refer only to the word "person," immediately preceding, and are equivalent to the words "acting in aid or in assistance to the constable," and not to the words "for any thing done in obedience to any warrant." The case of *Postlethwaite v. Gibson*, decided by Lord KENYON, has been referred to. No man can entertain a higher respect for the memory of that noble and learned Judge than I do; but Nisi Prius decisions, coming even from him, unless they have been acted upon by succeeding Judges sitting in bank, are entitled to very little consideration. It seems to me, therefore, that this rule should be made absolute.

Rule absolute.

1820.
 Jan. 24.
 [353]

MADRAZO v. WILLES.†

(3 Barn. & Ald. 353—359.)

A foreigner who was not prohibited from carrying on the slave-trade by the laws of his own country, might, notwithstanding the Acts of Geo. III. relating to the slave-trade, recover, in a British court of justice, damages sustained by him in respect of the wrongful seizure, by a British subject, of a cargo of slaves on board of a ship then employed by him in carrying on the African slave-trade.

THE declaration stated that the plaintiff was a subject of the King of Spain, and that on the 12th of July, 1817, at Havannah, in the island of Cuba, he was lawfully possessed of a certain brig called, &c. and continued so possessed until the committing of the trespasses after mentioned, to wit, at, &c.; and that the said brig was, to wit, on, &c. lawfully cleared out for a certain voyage in the slave-trade, to wit, from Havannah to the coast of Africa, and back; and that on the 16th of January, 1818, on the high seas, to wit, off Cape St. Paul's, on the coast of Africa, defendant, with force and arms, seized the said brig, together

† Although the application of this case is now restricted by the extension of legislation in other countries, and conventions relating to the slave-

trade (a treaty with Spain was concluded in 1835), it may still be of practical use as an authority on a point in the conflict of laws.—R. C.

with her stores, &c. and 300 slaves, and also divers goods, &c. on board of the said brig, and kept and detained them for a long time, and converted and disposed of the slaves, goods, &c. to his own use; by *means whereof the said brig was prevented from further prosecuting the said voyage, and the plaintiff deprived of great gains, which would have accrued from the slaves and goods, and from taking on board other slaves and other goods, and from carrying them to the island of Cuba: plea, not guilty. At the trial at the last London sittings after Michaelmas Term, it appeared that the defendant, who was a captain in the Royal Navy, had on the 16th of January, 1818, off Cape St. Paul's, unlawfully taken possession of the ship of the plaintiff, a Spanish merchant, which was engaged in the slave-trade on the coast of Africa. The only question which arose was as to the amount of damages. It occurred to the Lord Chief Justice at the trial, that the plaintiff was not entitled to recover the value of the slaves in an English court of justice; and accordingly, he desired the jury to find their verdict separately for each part of the damage, giving to the defendant liberty to move to reduce the verdict to the smaller sum, in case the Court should agree with him on the point. The jury found a verdict for the plaintiff, damages 21,180*l.*, being for the deterioration of the ship's stores and goods, 3,000*l.*, and for the supposed profit of the cargo of slaves 18,180*l.* And now,

MADRAZO
v.
WILLES.

[*354]

Jervis moved for a rule *nisi* to reduce the damages to 3,000*l.*:

By the 47 Geo. III. c. 36,† the slave-trade, and all dealings connected with it, were declared unlawful. It follows, therefore, as a consequence, that no one can be allowed to recover damages in respect of a cargo of slaves. And the 51 Geo. III. c. 23,† goes still further; for it declares that trade to be contrary to the principles of *justice, humanity, and sound policy. Now, it being the duty of English courts of justice to be guided by those principles, no one, whether he be a foreigner or an Englishman,

[*355]

† These Acts have been repealed by the S. L. R. Act 1861, but the principles have been re-enacted and extended by subsequent Acts. See now the Slave Trade Act, 1873, 36 & 37 Vict. c. 88.—R. O.

MADRAZO
v.
WILLES.

can be permitted there to claim any compensation in respect of such a traffic. The 58 Geo. III. c. 36, is, indeed, relied on by the other side; but that Act, which was passed with a view of carrying into effect a treaty with Spain on this subject, ought not to affect the present question. Indeed, the fourth article of the treaty is strongly in favour of the defendant; for it provides, that the British Government shall make compensation, out of a sum provided by Parliament, to Spanish merchants, for the seizure of their ships, which would seem to prove, that, independently of that, such merchants had no other remedy.

ABBOTT, Ch. J. :

On further consideration, it appears to me that there is no sufficient ground for reducing this verdict to the smaller sum found by the jury. Considering the very extensive language used in the two Acts of Parliament to which we have been referred, I had at first thought that it was not competent, even for a foreigner, to come into an English court of justice, and there to recover damages for a loss sustained by him in the prosecution of a trade declared by the British Legislature, in such strong language, to be unlawful. It was with that view that I directed the jury to separate the damages in this case; for it occurred to me, that though the plaintiff might not be entitled to recover for the slaves, still, inasmuch as, at all events, the defendant ought to have taken away the slaves promptly, if at all, the subsequent detention of the ship was an injury, for which the plaintiff was entitled to compensation. *But I am now satisfied that the words used by the Legislature, although large and extensive, can only be taken to be applicable to British subjects. By the 58 Geo. III. c. 36, it appears that a treaty had been made with Spain for the prohibition of an important branch of the trade; and that, with regard to the remainder, special provisions had been made, and a special court constituted for the purpose of settling the disputes which might occur. Now that shews most strongly, that but for such a treaty, the trade would have been perfectly legal in a Spaniard; and the 10th section of that Act, by which a certain sum is provided, as a full compensation for all losses sustained in consequence of the seizure of

[*356]

vessels previously to the ratification of that treaty, seems to me to corroborate most strongly this view of the subject; for it enables the parties sued to plead that clause in bar of the action, which would obviously have been unnecessary, if under the previous Acts no action could have been maintained at all. This clause, therefore, seems to me to be a legislative recognition of a foreigner's right of suit. And by the 11th and 12th sections it is provided, that all suits commenced in the Courts of Admiralty shall proceed, if commenced; and that the damages, &c. when recovered, shall be paid to the Government of this country. All these clauses, taken together, appear to me to shew, that what occurred to me at *Nisi Prius* was not a sound exposition of the law. I am therefore of opinion, that the verdict for the larger sum found by the jury is right, and that we ought to refuse this rule.

MADRAZO
v.
WILLES.

BAYLEY, J. :

I do not think that there is sufficient doubt, in this case, to induce us to grant a rule. A *British court of justice is always open to the subjects of all countries in amity with us, and they are entitled to compensation for any wrongful act done by a British subject to them. It is no answer to the present action to say, that it would not be maintainable by a British subject; for the only questions are, whether the act of the defendant be wrongful, and what injury the plaintiff has sustained from it? Although the language used by the Legislature in the statute referred to is undoubtedly very strong, yet it can only apply to British subjects, and can only render the slave-trade unlawful if carried on by them: it cannot apply, in any way, to a foreigner. It is true, that if this were a trade contrary to the law of nations, a foreigner could not maintain this action. But it is not; and as a Spaniard cannot be considered as bound by the acts of the British Legislature prohibiting this trade, it would be unjust to deprive him of a remedy for the wrong which he has sustained. He had a legal property in the slaves, of which he has, by the defendant's act, been deprived. The 58 Geo. III. c. 36, proceeds on this principle; and the provisions referred to by my LORD CHIEF JUSTICE, seem to me to be conclusive on the

[*357]

MADRAZO
v.
WILLES. subject. I think, therefore, that we ought not to disturb this verdict.

HOLROYD, J. :

[*358] However much I may regret that any damages can be recoverable for such a subject as this, yet I think we are bound to say that this plaintiff is entitled to them. I agree with the construction which has been put on the 58 Geo. III. c. 36; and I think, that even independently of that Act, the action *would have been maintainable for the loss of the slaves.

BEST, J. :

[*359] The statutes which have been referred to, speak in just terms of indignation of the horrible traffic in human beings; but they speak only in the name of the British nation. The declaration of the British Legislature, that the slave-trade is contrary to justice and humanity, cannot affect the subjects of other countries, or prevent them from carrying on this trade out of the limits of the British dominions. The assertion of a right to control the subjects of other States in this respect, would be inconsistent with that independence which we acknowledge that every foreign government possesses. If a ship be acting contrary to the general law of nations, she is thereby subject to confiscation; but it is impossible to say that the slave-trade is contrary to what may be called the common law of nations. It was, until lately, carried on by all the nations of Europe. A practice so sanctioned can only be rendered illegal by the consent of all the powers. Most of the States of Christendom have now consented to the abolition of the slave-trade, and concurred with us in declaring it to be unjust and inhuman. The subjects of any of these States could not, I think, maintain an action in the courts of this country for any injury happening to them in the prosecution of this trade; but Spain has reserved to herself a right of carrying it on in that part of the world where this transaction occurred. Her subjects could not legally be interrupted in buying slaves in that part of the globe, and have a right to appeal to the justice of this *country for any injury sustained by them from such an interruption. These principles are confirmed

by the decisions of the Court of Admiralty, and also by a judgment of Sir WILLIAM GRANT, pronounced at the Cock-pit. The cases to which I allude are, the *Fortuna*, the *Donna Marianna*, and the *Diana*, in the Admiralty Court; and the *Admedie*, before the Privy Council.† These cases establish this rule, that ships, which belong to countries that have prohibited the slave-trade, are liable to capture and condemnation, if found employed in such trade; but that the subjects of countries which permit the prosecution of this trade, cannot be interrupted while carrying it on. It is clear, from these authorities, that the slave-trade is not condemned by the general law of nations. The subjects of Spain have only to look to the municipal laws of their own country, and cannot be affected by any laws made by our Government. The rule for reducing the damages, in this case, must therefore be refused.

MADRASO
v.
WILLES.

Rule refused.

WEBSTER AND WOODYER, EXECUTRIX AND EXECUTOR
OF HEATLEY v. SPENCER.

(3 Barn. & Ald. 360—365.)

1820.
Jan. 25.
[360]

One of two executors having alone proved the will, had received a debt due to the testator, which by his will was appropriated to the payment of specific legacies to his grandchildren, with interest thereon, and afterwards permitted the money to be lent out to a third person, by whom it was paid to A. A. on being applied to by the executor, acknowledged that he had received the money, and that it belonged to the testator's grand-children, but refused to pay it over to the executor. Held, that both executors might join in an action brought to recover the money against A. : Held, also, that it does not amount to a devastavit, if an executor lends out on private security money belonging to the testator, but not wanted for the immediate uses of the will, provided he exercises a fair and reasonable discretion on the subject.

ASSUMPSIT for money lent, &c. by testator. The declaration contained counts upon promises to the testator in his life-time, and also to the plaintiffs after his death. There were also two counts, one for money had and received to the use of the plaintiffs, as executor and executrix, and the other, on an

† Dodson's Ad. Rep. 81, 91, 95.

WEBSTER
v.
SPENCER.

account stated with them in that character. Plea, general issue. At the trial at the last Summer Assizes for Chester, it appeared, that Thomas Heatley, by his will, bequeathed as follows: "Unto my son Benjamin's four children, the sum of 10*l.* each, with interest, the money now in the hands of Joseph Jennions." The will was proved by Anne Webster alone. It also appeared, that soon after the testator's death, Jennions paid the 40*l.* to Anne Webster, and it had been lent, through the intervention of Benjamin Heatley, to John Winpenny, who, having also borrowed 20*l.* from Benjamin Heatley, gave a promissory note for 60*l.* to the latter. This note was afterwards indorsed over to the defendant's wife. The defendant had admitted, on a claim being made by Webster, as executrix, that he had received from Winpenny the sum due on this note, and that 42*l.*, part of it, belonged to Benjamin Heatley's children, but he had refused to pay it over to her. The other executor,

[*361]

*Woodyer, had not assented to the present action. Under these circumstances, the learned Judges thought that Woodyer ought not to have been joined in the action, and directed a nonsuit, giving liberty to the plaintiffs to move to enter a verdict for 42*l.*, in case this Court should be of a different opinion. *D. F. Jones*, in last Michaelmas Term, having obtained a rule *nisi* to that effect,

W. D. Evans and *Littledale* shewed cause. * * *

[362]

D. F. Jones and *W. J. Law*, *contra*, stopped by the Court.

ABBOTT, Ch. J. :

The question in this case is, whether this money, when recovered, would be assets in the hands of the executors; if it would, then the action is properly brought in the name of both. It appears to me, that this money would be assets. The circumstances are these. Thomas Heatley, by his will, left a specific sum of 40*l.*, to be paid, with interest, by his executors, in equal proportions of 10*l.*, to the four children of Benjamin, his son; and he stated, that the money was then in the hands of Joseph Jennions. It appears that Anne Webster alone proved

the will. Now, if an action had been brought against Jennions for the money, it is clear, that the other executor must have been joined. But Jennions paid it, without any action, to Anne Webster, from whom it appears to have passed to Benjamin, and to have been lent by him to Winpenny, together with another sum of 20*l.* of his own. For both these sums, a promissory note for 60*l.* was given, which was afterwards endorsed over to Spencer. Now both Spencer and Winpenny knew to whom the 40*l.* belonged, and it was under these circumstances that Spencer made the acknowledgment, *that he had received 60*l.* from Winpenny, and that 40*l.* belonged to Benjamin's children, as having been left to them by their grandfather. The question then is, whether the executors have not, as trustees, a right to recover this money for the use of the children. If Spencer misapplies it, the executors would be liable, and he therefore can have no right to retain the money, as against them. It is said, that Anne Webster, by lending this money, was guilty of a *devastavit*; it is not clear, however, from the evidence, that she did lend the money to Benjamin Heatley. This, however, is not an action for money lent, but one against Spencer, to whom Winpenny has paid the money. It would be too much to say, that an executor, who lends money belonging to the testator, which is not wanted for present purposes, is therefore guilty of a *devastavit*. And if the borrower knows, at the time, that it is the money of the testator, I can see no reason why the executor should not recover it in that character. The special circumstances of this case are, however, the ground of my decision; and I think that both these executors, having been entrusted, by the testator, with the care of this sum of money, have a right to recover it from the present defendant, in their character of executors, and, consequently, that it was right to join both of them in the present action.

WEBSTER
v.
SPENCER.

[*363]

BAYLEY, J. :

I have no doubt in this case, that it was right to join both executors. An executor derives title, not from the probate, but from the will, and a probate granted to one executor enures to the benefit of all; and all must join in an action brought in that

WEBSTER character. Then the only question in the present case is, whether *the plaintiffs are entitled to bring this action as executors, and that depends upon this, whether the money, when recovered, would be assets? Now we trace this money from Jennions to Winpenny, and from him to Spencer, who, by his own acknowledgment, receives it for the children of Benjamin Heatley; and they have a right to look to the executors, who are accountable to them for the money. It seems to me, that if we can trace the money from the executors to the defendant, who received it, knowing it to be the money of the testator, that it still remains assets, recoverable by the executors. It is said that this is not so, because the loan by Anne Webster was wrongful, and amounted to a devastavit. But if that were the case, it would follow, that she, by her own wrongful act, might improve her own personal estate. For then, upon her death, this money, instead of going to the surviving executor, would go to her personal representative. The argument would come to this, that if an executor were wrongfully to dispose of a specific chattel belonging to the testator, and afterwards to recover possession of it, the property would belong to him in his individual, and not in his representative character. There may be many cases, in which it is the duty of an executor to lend out money belonging to the testator. Suppose he has in his hands a sum which will not be called for till a distant period, is it to lie idle during all that time? And, previous to the institution of public funds, it must have been lent out, in all cases, upon private security. It seems to me, that upon this subject the executor should be allowed to exercise a fair and honest discretion, and, that if he does so, he cannot be guilty of a devastavit.

[*364]

[*365] The foundation of the objection, therefore, fails; *and, as the circumstances of this case enable us to trace the money, it seems to me, that in the transaction, B. Heatley and Spencer, both, acted as agents of the executors, and that the latter have now a right to require the money to be placed in their hands, for the purpose of executing the trusts reposed in them by the will.

HOLROYD, J. :

I am of the same opinion. Executors derive their authority,

not from the probate but from the will; and it is clear that if this money, when recovered, would be assets, both executors must join in the action. Now there is no doubt that this money was originally assets, and that that fact was known to the defendant when he received it; and if so, it seems to me, that in an action for money had and received, brought against him to recover it, the damages will be also assets. Even taking it as a loan to him, it does not appear to me that it would make any difference. It would still be a part of the testator's property, for the detention of which damages might be recovered, and which would be assets. It seems to me, therefore, that the executors, in some cases, might sustain a count for money lent by themselves, and join it with a count for money lent by the testator, in his life-time. In the case of an insolvent estate, it would be different; because there they would be bound, not to lend the money, but to apply it in payment of the testator's debts. I think, therefore, that this rule ought to be made absolute.

WEBSTER
v.
SPENCER.

BEST, J. concurred.

Rule absolute.

THE KING v. THE INHABITANTS OF BLEASBY.

(3 Barn. & Ald. 377—382.)

1820.
Jan. 29.
[377]

Where a pauper, being settled by parentage in A., at the age of thirteen years was hired and served for a year in A., and afterwards, when he was sixteen years old, returned to and lived with his father's family until he became of age: Held, that having acquired a settlement of his own in A., he did not follow the settlement of his father subsequently gained in another parish.

WILLIAM KIRKHAM, with his wife Catherine and four children, was removed from Bleasby to Thurgarton, in the county of Nottingham, by an order of two justices dated 19th January, 1819. The Sessions, on appeal, discharged the order, subject to the opinion of this Court on the following case:

The pauper was born at Gonalstone, the place of his father's settlement, in June, 1785; and at Martinmas, 1798, being then thirteen years of age, was hired and served for a year with

THE KING
v.
THE INHABI-
TANTS OF
BLEASBY.

James Hind, of Gonalstone aforesaid, farmer. When the pauper was about sixteen years of age, his father gained a settlement in Thurgarton by renting a tenement of the yearly value of 10*l.* on which the father continued to reside during the remainder of the pauper's minority, and the pauper continued during such period (that is, from about two years after the expiration of his service in Gonalstone, until he was twenty-one years of age,) to reside in his *father's house at Thurgarton, working during the time as a journeyman framework-knitter, and occasionally paying part of his earnings to his father who was a labourer, as a compensation for his board. The Sessions being of opinion, that the pauper had gained a settlement in his own right in Gonalstone, by the hiring and service, and that the settlement gained about two years afterwards in Thurgarton by the pauper's father, did not vary or affect the settlement of the pauper, discharged the order.

[*378]

[*379]

Scarlett and Balguy, in support of the order of Sessions, [argued that the pauper, under the 3 W. & M. c. 11,† gained a substantive settlement in his own right, which put an end altogether to his derivative settlement from his father.] And even if the case be put on the ground of emancipation, it may be safely contended, that the pauper was emancipated; for the acquiring a settlement is distinctly stated by Lord KENYON as one of the *modes of emancipation, *Rex v. Witton cum Twambrookes*.‡

Nolan and Denman, contra:

If a child be not emancipated but continues a part of its father's family, every new settlement acquired by the³ father, is also a new settlement acquired by the child. And, therefore, in the present case, if the pauper was not emancipated, the settlement in Thurgarton is his last legal settlement. * * In *Rex v. Keel* § it was distinctly stated, that a party can acquire no

† The section referred to is repealed by the S. L. R. Act, 1867. But the case is still an authority for the principle, that the residence with the father after gaining a settlement is an independent residence: *Salford Guardians*

v. Manchester Overseers (1882) 10 Q. B. D. 172, 176; 52 L. J. Q. B. 34.—B. O.

‡ 1 R. R. 717 (3 T. R. 355).

§ Cald. 144.

new settlement in a place where he was settled before. If so, the hiring and service in this case gave none at Gonalstone, and then no doubt can remain on the point. * * *

THE KING
v.
THE INHABI-
TANTS OF
BLEASBY.

ABBOTT, Ch. J.:

[380]

I am of opinion that, in this case, the order of Sessions should be confirmed. There are, undoubtedly, some consequences which will follow from this decision, which are to be regretted, but they are consequences arising from the system of the poor laws, over which the Court has no control. There is, however, another inconvenience, I mean the great frequency of legal controversies, which this Court can, in some degree, prevent, by not departing from the decisions of our predecessors who have left us, as it seems to me, an intelligible rule upon this subject. I take it to be settled law, that if a child acquire a settlement of his own, although he may afterwards, during his minority, return and live with his father's family, he does not follow the settlement of his father subsequently obtained. In this case the pauper did acquire a settlement by the hiring and service in Gonalstone; and after that time he derived his settlement no longer from his father, but from the contract of hiring. I cannot agree with what is stated in *Rex v. Keel*† on that subject; and, indeed, the point was no part of the decision of the Court in that case. For the question, both there and in *Rex v. Ingworth*,‡ was, whether a certificate was discharged by a hiring and service in the certifying parish, and the Court held that it was not, on the ground, probably, that it was better to hold that no settlement gained in the parish granting the certificate, should affect the parish to whom it was granted, it not being a question into which the latter would be likely to enquire. Those cases are, however, *very distinguishable from the present. I am, therefore, of opinion, that the order of Sessions ought to be confirmed.

[*381]

BAYLEY, J.:

I am of opinion, that the cases relating to certificated persons ought to be wholly laid out of the question, in the present case.

† Cald. 144.

‡ 8 T. R. 339.

THE KING
 v.
 THE INHABI-
 TANTS OF
 BLEASBY.

It has long been considered as a point settled by *Rex v. Witton cum Twambrookes*† that the settlement by parentage only continues so long as the child remains a member of the family, and that the settlement of a child who has acquired one of his own does not shift with that of the father. Then the only question is, whether this pauper has done any act to gain a settlement of his own in Gonalstone. It is said that he has not, because he had a settlement there before, but the words of the statute of the 3 W. & M. expressly provide, that if an unmarried person shall so be hired and serve, he shall be judged and deemed to have a good settlement. It seems to me, that the statute having expressly provided this, the pauper who was hired and served a year in Gonalstone, did gain a settlement there, and that the order of Sessions must, therefore, be confirmed.

HOLBOYD, J. :

I think that, in this case, the settlement of the son was not varied by the settlement of the father, subsequently obtained. The cases which have been cited with respect to certificates do not seem to me to be applicable to the present. I can see no reason why a party should not gain a new settlement in the parish in which he had one before, where originally he had it in another right, as derived from his father, and subsequently in his own right, under the contract of hiring and service. I therefore fully agree with *the Court in thinking that this order ought to be confirmed.

[*382]

Order confirmed.‡

† 1 R. B. 717 (3 T. R. 355).

‡ Best, J. was absent in the Bail Court.

BUTLER v. WILDMAN.†

(3 Barn. & Ald. 398—407.)

1820.
Feb. 4.

[398]

The captain of a Spanish ship, in order to prevent a quantity of dollars from falling into the hands of an enemy, by whom he was about to be attacked, threw the same into the sea, and was immediately afterwards captured: Held,—in an action upon a policy of insurance upon Spanish property, subscribed by British underwriters, who, at the time of effecting the policy, knew that the assured were Spaniards, and that Spain was at war with the state to whom the capturing vessel belonged,—that this was a loss by jettison, that term, in a policy of insurance, signifying any throwing overboard of the cargo for a justifiable cause; secondly, that it was a loss by enemies; and thirdly, if not by jettison, in the strictest sense, that it was something of the same kind, and therefore came within the words “all other losses and misfortunes.”

DECLARATION upon a policy of insurance on dollars at and from Cadiz to any port or ports in Cuba, and from thence to La Guaira. The policy was in the common form, and described the perils insured against to be of the seas, men of war, fire, enemies, pirates, rovers, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that had or should come, to the hurt, detriment, and damage of the said goods and merchandizes, and ship, &c. or any part thereof. The declaration, after stating the promise and the subscription of the policy, and the loading of the dollars, averred that one Joze Dieze Ymbrechts, a subject of the King of Spain, was interested in the dollars insured, and also that Lopez, the commander of the vessel, was a subject of the King of Spain, and that before, and at the time of effecting the policy, and of the loss, open war was waged between the King of Spain, and certain persons exercising the powers of government in parts beyond the sea, viz. in parts of South America, formerly belonging to and constituting part of the dominions of the King of Spain, of all which said several premises, the defendant, at the time of

† Referred to as an authority on *Co. v. Hamilton & Co.* (H. L. 1887) the last point, by Lord HERSCHELL 12 App. Cas. 484, 495; 56 L. J. Q. B. 626.—R. C.

BUTLER
v.
WILDMAN.
[*399]

effecting the policy, had *notice. It then stated, that while the ship was in the course of her voyage, an armed vessel proceeding from and manned with part of the crew of a ship of war carrying a letter of marque from and acting under the authority of the persons so exercising the powers of government in the parts of South America aforesaid, made up to the said ship in the said policy mentioned for the purpose of attacking the same, and afterwards did attack and capture the said ship, whereby the said ship became wholly lost to the proprietor thereof; and that just before the said armed vessel did attack and capture, and while she was preparing to attack the said ship, in the said policy mentioned, the said Joze Lopez, the said commander thereof, in order to prevent the dollars from falling into the hands of the persons so on board the said armed vessel, and so acting under the authority of the persons so exercising the powers of government in the said parts of South America aforesaid, then and there cast and threw into the sea a certain large quantity, to wit, 100,000 of the said dollars in the said policy of insurance mentioned, whereby the same became wholly lost to the proprietor thereof. To this declaration there was a general demurrer, and it was now argued by

Campbell in support of the demurrer :

The declaration in this case is insufficient, because it does not shew that the capture of the ship was inevitable at the time when the dollars were thrown overboard. It is not stated that any resistance was made, or that there were no means of resistance. Assuming, however, that the declaration is sufficient in point of form, the facts stated do not constitute a loss within the policy. [*400] It is not a *loss by jettison, for that term only comprehends the case of throwing overboard a part of the cargo for the sake of preserving the remainder and the ship; that is the sense in which it is considered by all writers on maritime law. Emerigon, *Traité des Assurances*, c. 12, s. 40, where numerous authorities from other foreign writers are collected, considers jettison in that sense only, even when he is treating of it as the subject of a loss within the policy. Secondly, This is not a loss within the meaning of the term “enemies,” because it does not proceed

BUTLER
v.
WILDMAN.

immediately from any act done by enemies, but from an act done by the captain under the influence of fear, and the effect of considering this as a loss within the policy will be to increase the risk of the underwriter, by depriving him of the chance of re-capture. Emerigon, indeed, c. 12, s. 17, lays it down, that if the captain burns his ship, in order to prevent it falling into the hands of the enemy, when capture is inevitable, that is a loss within the policy, but in the cases put by him the loss proceeded immediately from fire, one of the risks enumerated in the policy, and the assured and assurers were members of the same state, and had a common interest in preventing property from falling into the hands of the enemy. Thirdly, This is not a loss within the words "all other losses or misfortunes;" for those words can only comprehend losses *ejusdem generis* with those described in the enumerated risks: here, the immediate cause of the loss was the act of the captain induced by fear, and it is not, therefore, of the same description with any of the causes of loss described in the enumerated risks. In the course of the argument, *Hadkinson v. Robinson*,† *Hunter v. Potts*,‡ *Rohl v. Parr*,§ were cited.

Barnewall, *contra*, was stopped by the COURT.

[401]

ABBOTT, Ch. J. :

I am of opinion that the plaintiff is entitled to recover. The defendant, upon this general demurrer, has taken two objections, one to the form of the declaration in which the loss is stated; the other, that this is not a loss within the policy. Now, the declaration states the loss thus, that whilst the said ship was proceeding on her voyage, a certain armed vessel proceeding from and manned with part of the crew of a certain ship of war, carrying a letter of marque from and acting under the authority of the persons so exercising the powers of government in the parts of South America aforesaid, made up to the said ship in the said policy mentioned, for the purpose of attacking the same, and after-

† 7 R. R. 786 (3 Bos. & P. 388).

§ 5 R. R. 741 (1 Esp. 445).

‡ 16 R. R. 776 (4 Camp. 203).

BUTLER
v.
WILDMAN.

[*402]

wards did attack and capture the said ship, whereby the said ship became wholly lost to the proprietor thereof. Now, supposing the declaration had stopped here, and the dollars had remained on board, this would clearly have been a good averment of a loss by capture. The declaration then proceeds to state that just before the said armed vessel did attack, and whilst she was preparing to attack the said ship in the said policy mentioned, the said commander thereof, in order to prevent the dollars insured by the said policy from falling into the hands of the persons so on board the said armed vessel, then and there cast and threw into the sea, a certain quantity of the same, &c. Now, taking the whole allegation together, it appears, that at the instant when the ship was captured, these dollars were thrown overboard by the master. It is not, indeed, in terms, alleged that this was necessary to be done; but I think we must so understand it; and, at *any rate, that is an objection which could only prevail upon special demurrer. If, indeed, the dollars had been thrown overboard by the master, and the ship had been subsequently re-captured, it would be a question for the jury, under the circumstances, to say whether he was justified in what he did. I think, therefore, that the loss is sufficiently stated. Then the question arises, whether this be a loss for which the underwriters are liable. I am of opinion that this is a loss by jettison, or if not, strictly speaking by jettison, it is something *ejusdem generis*, and therefore falls within the general words, "all other losses or misfortunes, &c." Jettison, in its largest sense, however, signifies any throwing overboard; but, in its ordinary sense, it means a throwing overboard for the preservation of the ship and cargo, and most of the jurists treat of it in this sense, under the head of general average. The present case is an extraordinary species of jettison. I cannot, however, distinguish it in principle, from the case where the captain sets fire to his ship to prevent her falling into the hands of the enemy. Now it is laid down, by Emerigon and Pothier, that the underwriters are liable for such a loss; and I think, therefore, they are equally so in the present case. It is said, however, that in those cases, the assured and underwriters were all of the same nation; so long, however, as the insurance of

the property of a foreigner is not contrary to the law of England, the underwriter who insures, must be considered as placing himself in the same situation as the foreigner; for he has undertaken to indemnify the assured against enemies, and that must mean enemies of the state of which the assured is a member. I am, *therefore, of opinion, that the plaintiff is entitled to the judgment of the Court.

BUTLER
v.
WILDMAN

[*403]

BAYLEY, J. :

I am of the same opinion. If the dollars had not been thrown overboard, it is clear that they would have fallen into the hands of the enemy, for the ship was, in point of fact, taken; and if the loss here stated had been declared upon as a loss by jettison, or by enemies, or within the concluding words "all other losses and misfortunes," the facts stated would have supported that averment. Jettison, in its largest sense, means any throwing overboard. In the passage cited from Emerigon, he is treating of jettison with reference to cases of general average, where jettison is used in a confined sense. But its true meaning, in a policy of insurance, seems to me to be any casting overboard *ex justa causa*. Now was that so here? The circumstances are these. This was a Spanish ship, and the property insured was Spanish, and there was a war between Spain and her colonies. It was, therefore, the duty of the master, who was a Spanish subject, to prevent anything which could strengthen the hands of the enemy from falling into their possession. Now, as money would strengthen the enemy, it was the duty of the master to throw it overboard; and the sacrifice of the money was, therefore, *ex justa causa*. It seems to me, therefore, that this is a loss by jettison. But if it be not a loss by jettison, it is a loss by enemies. It clearly falls within the principle stated by Emerigon, in the case of the destruction of the ship by fire; and I think the enemy was the proximate cause of loss. In point of principle, there is no distinction between this and the case of a ship burnt, to prevent its falling into the *hands of the enemy, and I can see no solid distinction between the ship and cargo. The cargo, which in this case was money, becomes immediately convertible to hostile purposes. But, assuming

[*404]

BUTLER
v.
WILDMAN. that this was not strictly jettison, it is something *ejusdem generis*, and may, therefore, be comprehended within the words "all other losses and misfortunes." In *Cullen v. Butler*,† a British ship of war mistaking a British trading vessel for an enemy, fired into and sunk her. It was contended, that this not being a cause of loss described in any of the enumerated risks, was not within the policy; and *Hadkinson v. Robinson*, *Hunter v. Potts*, and *Rohl v. Parr* were cited. The Court, however, were of opinion, that it was a loss within the meaning of the words "all other losses and misfortunes." I think, that the facts stated in this case, constitute a loss within the meaning of those words. The judgment must therefore be for the plaintiff.

HOLROYD, J. :

I think that this is a loss within the policy, and by jettison, for the reasons already given by the Court, although it be not that species of jettison which would be the subject of general average.‡ It seems to me, also, that it is a loss by enemies; for the meditated attack was the direct cause of the loss. Suppose that the cargo, instead of being dollars, had been gunpowder, or other ammunition, and that, instead of having been thrown overboard, a part had been consumed, in resisting the attack of the enemy, that would clearly be a loss by enemies; and I cannot *distinguish that case from this.§ If we were to hold that this were not a loss within the policy, we should hold out

† 17 R. R. 400 (5 M. & S. 461; 4 Camp. 289; 1 Starkie, 138).

‡ This *obiter dictum* is referred to by WILLS, J. in *Royal Mail Steam Packet Co. v. English Bank of Rio de Janeiro* (1887) 19 Q. B. D. 362, 373; 57 L. J. Q. B. 31.—R. C.

§ A loss by jettison, even in its confined sense, viz. where goods are thrown overboard in a storm, for the sake of preserving the ship and the remainder of the cargo, is usually declared upon as a loss by perils of the sea; yet, in that case, it might be urged that the loss proceeded immediately from the act of the cap-

tain, and that the underwriter was thereby deprived of all chance of the property being saved, which might be the case if the storm had suddenly abated. If jettison, therefore, be a loss by perils of the sea, the loss stated in this declaration must equally be a loss by enemies. A common carrier is liable for all losses, except those proceeding from the act of God, or the King's enemies. The throwing overboard of goods in a storm to preserve the lives of passengers, has been held to be a loss proceeding from the act of God so as to excuse the carrier. See the *Gravesend Barge case*.||

|| 1 Roll. Rep. 79.

a temptation to the captain of a vessel, even with warlike stores on board, rather to suffer them to fall into the hands of the enemy, than to sacrifice them in this manner. It seems to me, therefore, that we ought to hold this to be a loss, for which the underwriters are liable. I think that this is a loss by jettison or by enemies; and also, that it comes within the words "all other losses and misfortunes," which include all losses of the same nature with those described in the enumerated risks.

BUTLER
v.
WILDMAN.

BEST, J.:

This question is new in the Courts of this country. In the absence of all authority, we must put that construction upon the contract of assurance which is most agreeable to justice. French policies are nearly similar to those used in this country. As learned French writers and the tribunals of France have put a construction upon their policies, in cases like the present, we may avail ourselves of their opinions and decisions, to assist us in deciding on the *policy now under our consideration. Pothier, in his Treatise on the Contract of Insurance, c. 1, s. 2, ar. 2, gives the description of general risks in these words: "Seront aux risques des assureurs toutes pertes et dommages qui arriveront sur mer et généralement toutes fortunes de mer." This learned writer, in the next page of his valuable work, states, that, in his opinion, the underwriters are responsible for such a loss as that which is sought to be recovered in this case. It appears also from Emerigon,[†] that there are decisions of the Courts of France, pronounced by the parliaments of Bourdeaux and Provence, on appeals from inferior tribunals, which expressly confirm the opinion of Pothier. In these cases, the assured and underwriters were subjects of the same country, but this circumstance appears to me to make no material difference. The defendant knew that the assured was a Spaniard, and that there was war between her and her colonies, and the insurance is against enemies. The underwriter must have presumed that the assured would act as became a good subject of the country to which he belonged, and it was the duty of a loyal Spaniard to

[*406]

[†] Emerigon, 438.

BUTLER
v.
WILDMAN.

[*407]

prevent money from falling into the hands of the enemies of Spain. This loss comes within the general words of the policy. The use of these words is, to enlarge the construction of the terms by which particular losses are before mentioned, and to extend them to cases coming very near, but not precisely within the specified losses. Thus one of the losses particularly specified, is a loss by enemies. If there had been no general words, the loss by enemies might be said only to include an actual taking or destruction by the hand of the enemy, (although it may *be observed that such a loss would fall within the other words, takings at sea, men of war, letters of mart and countermart;) the general words, however, afford a complete answer to such an argument, by including all losses which are the consequences of justifiable acts done under the certain expectation of capture or destruction by enemies. The loss, in the present case, is the consequence of one of those justifiable acts. Dollars, we have been told, are not warlike stores, but they will afford the readiest means of procuring every instrument of war. It has been said, also, that this act of the captain deprived the underwriter of the chance of re-capture. As the event has shewn that his conduct was not the effect of a vain fear, but of a resolution wisely and honestly taken, he was justified in doing what he did, and the underwriters have no right to object, although they might have been placed in a less advantageous situation than they otherwise would have been in. It is objected, that British underwriters ought not to be made to pay for Spanish patriotism; but they must be liable to these payments, if they insure Spanish ships against enemies, when Spain is engaged in war. For these reasons, I am of opinion, that judgment should be given for the plaintiff.

Judgment for the plaintiff.

HOBHOUSE'S CASE.

(3 Barn. & Ald. 420—425; S. C. 2 Chitty, 215.)

1820.
Feb. 5.

[420]

The writ of *habeas corpus* at common law, although a writ of right, is not grantable of course, but only on motion in Term time, stating a probable cause for the application, and verified by affidavit: Quære, whether under the statute 31 Car. II. c. 2, which only applies to cases where the application is made to a Judge in vacation, the writ be grantable of course.

J. EVANS moved, on Thursday, February 3, for a *habeas corpus*, to bring up the body of John Cam Hobhouse, Esquire, on an affidavit, that he was confined in Newgate by a warrant from the Right Honourable Charles Manners Sutton, Speaker of the House of Commons, a copy whereof was annexed. Being desired to point out his objections to the warrant, he contended, that he was not bound to do so, because the writ of *habeas corpus* was grantable, in the first instance as of course; and the proper time for pointing out the defects of the warrant would be, upon the *return to the writ. And he cited *Rex v. Flower*,† where Lord KENYON said, that the Court were bound to grant the writ; and he also referred to statute 31 Car. II. c. 2, s. 10, where a Judge in vacation is directed to do it, under a penalty of 500*l.* upon refusal; which was a proof of the opinion of the Legislature on the point. The COURT, upon this (*absente* BAYLEY, J.), granted the writ; and, upon the return of it, the prisoner, in person, took several objections to the Speaker's warrant, which were overruled; and he was accordingly remanded. The prisoner having quitted the Court,

[*421]

ABBOTT, Ch. J. :

I wish to express my opinion as to the propriety of granting this writ of *habeas corpus*. It seems to me, that the Court are not bound as of course, and without any cause shewn, to grant this writ in the first instance. It would be a very strange inconsistency in the law of England, if we were bound to do an act nugatory in itself, and that would be the case, if, upon a view of the copy of the warrant, a writ was, of course, to issue, the only

† 4 R. R. 662, 673 (8 T. R. 314, 321).

HOBHOUSE'S
CASE.

effect of which would be, that, upon the return to it, the prisoner must be remanded. When this application was made, we were referred to a dictum of Lord KENYON in *Rex v. Flower*, and, in deference to that authority, we granted the writ. But I think, upon subsequent consideration, that we ought not to have granted it, inasmuch as it then appeared, that it could be of no use whatsoever to the prisoner. There is a very elaborate opinion, delivered by WILMOT, Ch. J. in 1758, in the House of Lords, in answer to a question put by that House, whether, in *cases not within the 31 Car. II. c. 2, writs of *habeas corpus ad subjiciendum*, by the law, as it then stood, ought to issue of course, or upon probable cause, verified by affidavit.† He there states it to be his opinion, that those writs ought not to issue of course; adding, that a writ which issues on a probable cause, verified by affidavit, is as much a writ of right as a writ which issues of course. And again, page 87, he says, “There is no such thing in the law as writs of grace and favour issuing from the Judges. They are all writs of right, but they are not all writs of course.” And in page 88, “writs of *habeas corpus* upon imprisonment, for criminal matters, were never writs of course; they always issued upon a motion, grafted on a copy of the commitment; and cases may be put, in which they ought not to be granted.” 1 Lev. 1, Comberb. 74. If malefactors under sentence of death, in all the gaols of the kingdom, could have these writs of course, the sentence of the law might be suspended, and, perhaps, totally eluded by them. The 31 Car. II. c. 2, makes no alteration in the practice of the Courts in granting them: they are still moved for in Term time, upon the same foundation as they were before; and when a single Judge, in vacation time, grants them under 31 Car. II. c. 2, in criminal cases, a copy of the commitment, or an affidavit of the refusal of it, must be laid before him. He must judge, even in that case, whether treason or felony is specially expressed in the warrant of commitment; and there have been a great number of cases, where a doubt has arisen, on the frame and wording of the warrant; so that, even upon the Act, the probable cause of bailing is really *disclosed to the Judge, unless the copy of the commitment is refused, and then the law will

† Wilmot's Opinions and Judgments, 81.

[*422]

[*423]

presume everything against it; and in cases out of the Act, HOBHOUSE'S CASE. which take in all kinds of confinement and restraint, not for criminal or supposed criminal matter, and to which this question relates, it has been the uniform uninterrupted practice, both of the Court of King's Bench and of the Judges of that Court, that the foundation upon which the writ is prayed should be laid before the Court or Judge who awards it. I fully concur in this opinion, and, therefore, I desire, that our having granted this writ may not be considered as any authority to shew that this Court is bound to grant a writ of *habeas corpus*, as of course, and without any ground being stated for our interference.

BAYLEY, J. concurred.

HOLROYD, J. :

The dictum of Lord KENYON, in *Rex v. Flower*, was the reason of our granting the writ in the first instance, although it was contrary to the impression on my mind at the time. Even upon 31 Car. II., I should think it very questionable, whether the writ was grantable of course; for that Act directs a Judge to grant the writ in vacation, upon view of the copy of the warrant. Now for what purpose is he to view the warrant, unless he is to judge of the validity of the commitment? It is admitted that he must judge of it afterwards, and must either discharge or remand the prisoner accordingly. Then why should he not do so at first? This, however, is not an application within that Act, being for a *habeas corpus* at common law; and in that case it is laid down by WILMOT, Ch. J. that the party applying for the writ must lay a reasonable *ground before the Court, in order to induce them to grant the writ. [*424]

BEST, J. :

When this writ was moved for, we were pressed with the opinion of Lord KENYON, in *Rex v. Flower*, which seemed to support the claim then insisted upon. The Court did not then think that that opinion was well founded. But, as it was a matter of great importance to the liberty of the subject, we thought it proper that the matter should be well considered. I

HOBHOUSE'S
CASE.

am now convinced, that when we see that the party, when brought before us, must be remanded, we are not bound to grant the writ. It would be manifestly absurd to bring a person from Cornwall or Northumberland, when the Court knew, at the time when the writ was moved for, that the prisoner, when brought before them, must be remanded. The Court, in *Rex v. Schiever*,† refused the writ, when it appeared that the person applying was a prisoner of war; and the same thing was done by the Court of Common Pleas, in the *Spanish sailor's* case.‡ If the Court could not examine into the legality of the custody, until the prisoner was brought before them, they ought to have granted the writs in both those cases; but they said, as the prisoners must be remanded when brought before them, they would refuse the writ. The cases in which prisoners have a right to the writ are where they are detained in prison, when they are entitled to be admitted to bail. This right is secured to such prisoners by the 31 Car. II. c. 2. Before the passing of that statute, prisoners committed for bailable offences were sometimes *kept for a long time in prison, without being brought to trial. To prevent this grievous oppression, the Habeas Corpus Act directs, that if any person be committed, or detained for any crime, unless for treason or felony, other than persons convict, or in execution by legal process, he may apply to the Lord Chancellor or a Judge in vacation, and the person so applied to is to cause such prisoner to be brought before him, and to discharge him from imprisonment, upon his recognizance to appear in the Court where his offence is cognizable. In cases which come under this statute, a single Judge may, perhaps, be obliged to grant the writ as of course, but in no other; and the provisions of this law do not apply to writs grantable by the Court in Term time. I, therefore, fully concur in the opinions already pronounced on this subject.

The prisoner was remanded.

† 2 Burr. 765.

‡ 2 Black. Rep. 1324.

[*425]

THE KING *v.* BORRON, Esq.

(3 Barn. & Ald. 432—440.)

1820.

[432]

Where a criminal information is applied for against a magistrate, the question for the Court is not whether the act done be found on investigation to be strictly right or not, but whether it proceeded from an unjust, oppressive, or corrupt motive (amongst which fear and favour are generally included), or from mistake or error only. In the latter case, the Court will not grant the rule. Secondly, in the investigation of a charge of felony before a magistrate, an attorney is only as a matter of courtesy permitted, but has no right to be present;† nor can he comment on the evidence so as to apply the law to it, unless he be requested by the magistrate to give his opinion and advice upon the case.

DENMAN, in last Michaelmas Term, obtained a rule *nisi*, for a criminal information against the defendant, a magistrate for the county of Lancaster. On the last day of that Term, *J. Williams* shewed cause against the rule, and *Denman*, *Chitty*, and *Hill*, were heard in support of it. The circumstances of the case were so fully stated by the LORD CHIEF JUSTICE, in pronouncing the judgment of the Court, in the course of this Term, that it has been thought proper to omit them here.

Cur. adv. vult.

ABBOTT, Ch. J. :

In the course of the last Term, a rule was granted, on the application of Mr. Charles Pearson, an attorney of the city of London, calling upon John Arthur Borron, Esquire, one of his Majesty's justices of the peace of the county of Lancaster, to shew cause *why a criminal information should not be exhibited against him, for refusing to take the examination of two persons, of the names of Thomas Richardson and Robert Rimmer, on a charge against a third person, of having feloniously cut and wounded the said Thomas Richardson, on the 16th of August last, at Manchester. Mr. Borron is a justice, acting for the Warrington division, and not for the division of Manchester wherein the offence was alleged to have been committed. Cause was shewn against the rule, on the last day of the Term; and it appearing, upon the arguments of counsel, that an important

[*433]

† The case is referred to, as an in *Cox v. Coleridge* (1822) 1 B. & C. authority on this point, by BEST, J. 37, 52.—R. C.

THE KING
v.
BORRON.

[*434]

question was supposed to be raised, regarding the execution of the office of a justice of the peace on the one hand, and the right of the subject to enquiry and investigation on the other, we thought it expedient to peruse the affidavits attentively, before we pronounced our rule in the case, which could not, without great inconvenience, be done on the last day of the Term. We have, accordingly, perused the affidavits attentively, during the late vacation ; and, upon such perusal, it appears to us, that the application for a criminal information is not sustained. The application is made against a gentleman, who is one of that class of persons to whom this country is under as great obligations as this or any other nation is, or ever was, to any members of its community ;—I speak of the gentlemen residing in the different parts of England, who act in the execution of his Majesty's commission of the peace, and who gratuitously devote a great portion of their time, and bestow much valuable, but often thankless labour, in the administration of many branches of the law ; and, among others, in most of the early, and in many of the mature stages of our criminal jurisprudence. *In this most valuable class, many persons are found who possess a sound knowledge of the law, united with the most useful and extensive practical information. They are called upon, in many cases of a difficult, and in many of a delicate kind, and are, in general, addressed by those who apply to them with the respect that is due to their station and character. The present case affords an unusual, if not a solitary instance, of address, in the language of demand and menace. They are, indeed, like every other subject of this kingdom, answerable to the law for the faithful and upright discharge of their trust and duties. But, whenever they have been challenged upon this head, either by way of indictment, or application to this Court for a criminal information, the question has always been, not whether the act done might, upon full and mature investigation, be found strictly right, but from what motive it had proceeded ; whether from a dishonest, oppressive, or corrupt motive, under which description fear and favour may generally be included, or from mistake or error. In the former case, alone, they have become the objects of punishment. To punish as a criminal any person who, in the

THE KING
v.
BORRON.

gratuitous exercise of a public trust, may have fallen into error or mistake belongs only to the despotic ruler of an enslaved people, and is wholly abhorrent from the jurisprudence of this kingdom. Upon these principles, the present application to this Court is to be decided by us. But even if it were to be decided upon a more strict and rigid rule, we should not be able to find any error or mistake in the conduct of Mr. Borron, except, perhaps, that of having shewn too much attention to an application made to him in a most improper and *unbecoming manner. Mr. Charles Pearson, of London, the person now applying to this Court, informs us, by his affidavit, that he was retained, on the 23rd of October last, by Thomas Richardson, of Manchester, to bring before the proper tribunal a charge which he had to prefer against an individual, whose surname is mentioned, for having feloniously, &c. cut and wounded the said Thomas Richardson, on the 16th of August, at Manchester. He then proceeds to mention the facts of the case, as communicated to him by Thomas Richardson, all the material parts whereof are also mentioned in the affidavit of Thomas Richardson, and such of them as are said to have been witnessed by Robert Rimmer are mentioned in his affidavit also. Affidavits, to be sworn by these two persons, were prepared by Pearson, after his return to London, and sent down by him to Manchester; and their affidavits, now before the Court, appear to contain many expressions not likely to be used by persons of their situation in life. These affidavits present two facts very important to the present enquiry: first, that the name of the person, by whom the supposed felony was committed, was unknown to Richardson and Rimmer at the time, and not discovered until after the assizes, which had intervened between the subject of complaint and the application to Mr. Borron; secondly, that the attack upon Richardson was made wantonly and wilfully, after the meeting at Manchester had been dispersed, by the authority of the justices acting in that district, when Richardson was going from the place of meeting peaceably, and alone; at a time, therefore, and under circumstances, in which those who had ordered the dispersion of the meeting, whether such order had been *properly or improperly given, could not be responsible

[*435]

[*436]

THE KING
v.
BORRON.

for the act of the supposed offender. Pearson further states a measure adopted by himself for the purpose of satisfying himself that Richardson had not mistaken the person accused, in which he appears to have conducted himself with becoming caution. The first of these facts, namely, the discovery of the name of the offender, after the assizes, does not appear to have been communicated to Mr. Borron. According to the representation made to him, the supposed offender was living at Manchester, not having fled, nor being likely or expected to fly from the calls of justice. The latter of these facts, namely, the time and circumstances of the alleged offence, were, at the first interview, mentioned to Mr. Borron, but his attention was not then, or afterwards, called to them as it ought to have been, in order to remove the ground of his disinclination to interfere, which was manifested at the first meeting. On the contrary, Mr. Borron was informed, as the reason for applying to him to exercise his authority on a matter arising in a part of the country in which he did not reside, and for which he had never acted, that the justices acting for the Manchester division had refused to enquire into some similar charges against the yeomanry, alleging that they might be, in some sense, considered as connected with the proceedings of that day, and as such, so implicated, as to render it improper for them to take cognisance of the charges. And it is obvious to us, and was apparent at the time, that Mr. Borron's reluctance to act on the occasion was grounded on the consideration, that his brother justices were in some way connected with the subject of complaint. It was the duty of an attorney to have pointed out the distinction. For *such purposes, and perhaps for such alone, can the presence of an attorney be useful on such an occasion. It appears, further, by the affidavits on each side, that Mr. Borron desired a day to consider of the matter, and, before his final refusal, consulted another justice of the county, who agreed in opinion with him, as to the conduct proper for him to adopt; and the fact of such consultation, at least, if not the opinion of the other justice, was made known to Pearson. The reason of Mr. Borron's refusal to act, as furnished to the Court by the affidavit of Pearson, was, that he declined any official inter-

[*437]

THE KING
BORRON.

ference with regard to individuals who could with difficulty be separated from the magistrates of Manchester on legal grounds. From Mr. Borron's affidavit, also, it appears, that this was the reason assigned by him, though much more at large; more, indeed, than was necessary. By Mr. Borron's affidavit, it also appears to the Court, for the first time, that he accompanied his then refusal with expressions to the following effect: "I by no means, however, wish it to be understood, that I shrink from any responsibility on this occasion, from personal inconvenience or trouble; and that if I am directed by the Court of King's Bench, to which you intimate your intention to apply, I shall fearlessly, and without regard to any party, proceed to investigate the charges submitted to me; charges, which not being now entertained, cannot be attended with any further consequences, than the not securing the persons of the individuals charged, during the interval to the next assizes, when bills of indictment may be preferred, which my refusal does not prejudice; a circumstance which, considering the lapse of time that has intervened, from the day the cause of complaint *arose, without the party's absconding, gives rise to little apprehension of such an event taking place." Now if this offer to investigate the charges, in case this Court should direct Mr. Borron to do so, had been communicated to us by the affidavit of Pearson, most undoubtedly, we would not have granted a rule for a criminal information. The suppression of the offer necessarily leads us to discharge the rule with costs, according to the usual practice in cases of this kind, and induces a strong suspicion, that the application was made for a very different purpose from that of having the matter of Richardson's complaint investigated by a justice of the county; for Mr. Borron's refusal was made on the 26th of October, and a mandamus might have been moved for on the sixth or seventh of the following month; and it is not surmised, that the person accused had absconded, or that an ultimate failure of justice is likely to occur. There are, however, some other circumstances in this case, which the Court cannot leave unnoticed. The whole conduct of Pearson towards Mr. Borron, as detailed by Pearson himself, was highly indecorous. An attorney applying to a justice of the peace, to act in a matter arising out of his

[*438]

THE KING
v.
BORRON.

[*439]

district, addresses him, throughout, in a tone of demand, he tells him the nature of the complaint, informs him that persons to prove it are in attendance, requires him to take their examination, and adds, "and I shall then take leave to comment upon the evidence, in order to apply the facts to the law of the case, and to obtain from you a warrant for the apprehension of the accused." Now this comment upon the evidence, is a thing which an attorney had no right to make. An attorney has no right even to be present at *such an enquiry. The presence of an attorney, on such occasions, is often permitted, as a matter of courtesy; his assistance is sometimes desired, and if his advice and opinion are asked, it is proper for him to give them; but he is not to take leave, uninvited, to obtrude his commentaries upon the case. Much less can it be endured, that he should say, on an occasion like the present, even in a respectful manner, "I make this application to you, as a ministerial officer; and, if you refuse to hear the evidence, I shall consider your refusal as a neglect of your magisterial duty, and shall apply to the Court of King's Bench, by information or otherwise, for redress." This was not an occasion on which a justice of the peace was to act as a ministerial officer; on the contrary, he was to exercise a judicial discretion on a subject important in itself, and rendered peculiarly delicate by the situation in which he stood. Whatever respect there might be in the manner of the address, its language was unfit and unbecoming. Yet was language of the same threatening import addressed, the next day, in a prepared written notice. The paper delivered to Mr. Borron, when he returned, after consulting Mr. Lyon, and before he had expressed his decision, concludes in these words: "and I do hereby give you notice, that if you refuse or neglect to hear such evidence, and to take such examination, I shall apply to the Court of King's Bench, on the first day of next Michaelmas Term, for a criminal information against you, the said John Arthur Borron, for having for fear or favour, refused to hear and examine witnesses touching and concerning a felony committed within the said county of Lancaster, of which you are one of the justices, as aforesaid." Little of that high-minded *and honourable sentiment, which usually influences the gentlemen

[*440]

who act in the commission of the peace, could be expected from one who should yield to such a threat. And we should be wanting in the discharge of our duty, if we forbore to express our disapprobation of such language. It is necessary only to add, further, that as the application to this Court, appears to be the act of Mr. Charles Pearson, the costs of the rule must be paid by him.

THE KING
v.
BORRON.

Rule discharged with costs.

ARNITT v. GARNETT.†

(3 Barn. & Ald. 440—442.)

1820.
Feb. 9.

[440]

Under the statute of the 8 Anne, c. 14, the sheriff is bound to retain one year's rent out of the proceeds of a tenant's goods taken in execution, provided he has notice of the landlord's claim at any time while the goods or the proceeds remain in his hands; and the Court, upon motion, ordered the same to be paid to the landlord, even where the notice was given after the removal of the goods from the premises.

A RULE *nisi* had been obtained by *Tindal* calling upon the sheriff of the county palatine of Lancaster, to shew cause, why he should not pay over to William Gregson all money received by him for the proceeds of a sale of certain goods of the defendant, seized under a writ of execution at the suit of the plaintiff on the premises of Gregson, occupied by the defendant. It appeared, upon the affidavit, that the sheriff had seized the goods of the defendant in execution, and had actually removed them to an auctioneer's for sale before nine o'clock in the morning; at that hour he received notice from the landlord, who then first heard of the execution, to retain for the amount of his rent. After this notice, the sheriff sold the goods in execution and refused to pay over the amount of a year's rent to the landlord.

Parke now shewed cause :

The goods had been removed from the premises before any notice was given, *and the sheriff was, therefore, afterwards justified in selling them without paying the year's rent to the landlord. The latter cannot distrain the goods which are taken in execution, and the object of the 8 Anne, c. 14, was only to remedy this, and to give to the landlord a specific lien on the

[*441]

† Followed, *Yates v. Radtledge* (1860) 5 H. & N. 249, 29 L. J. Ex. 117.

ARNITT
v.
GARNETT.

goods to the extent of one year's rent. The notice comes in lieu of a distress; and as the latter would be too late when the goods are removed, so the notice ought, in like manner, to be given whilst they are on the premises, *Henchett v. Kimpson*.† All the authorities shew that the sheriff is not bound to retain, unless he has notice from the landlord before the goods are removed, *Waring v. Dewberry*,‡ *Palgrave v. Windham*,§ and *Smith v. Russell*.|| At any rate the Court will not decide such a point on motion, but leave the landlord to his remedy by action, where it might be more solemnly considered; and the more so, as it appears on some of the affidavits, that there were sufficient goods left for the landlord to distrain upon: and *non constat* that in an action he would obtain the full amount of the year's rent, as he might have distrained on the residue.

ABBOTT, Ch. J. :

[*442]

Unless we were to repeal this Act of Parliament we must make this rule absolute. The statute says in express terms that no goods shall be taken by virtue of any execution unless the party at whose suit the execution is sued out, shall, before the removal of such goods from off the premises, pay to the landlord a year's rent. It is true that the sheriff does not become a wrong-doer *by the act of removing the goods, until he has notice of the landlord's claim, and perhaps a notice may be necessary to support an action against him as a wrong-doer. That, however, is no reason why the landlord should not have his rent. Here the sheriff had notice of the landlord's claim, while the goods were unsold, and he had the means of payment in his hands. We are bound, I think, to hold him responsible to the landlord for the year's rent. If we were not so to hold, the consequence would be that all the goods might be swept away, before the landlord could know of the execution, and he would lose his rent.

BAYLEY, J. :

This is a very plain case. The statute says, that the goods are not to be taken unless the plaintiff shall, before removal, pay the

† 2 Wils. 140.

‡ 1 Str. 97.

§ 1 Str. 212.

|| 12 R. B. 674 (3 Taunt. 400).

year's rent. The effect of the argument in this case would be, that the sheriff might remove instanter, and that by so doing the landlord might be deprived of his rent; that would operate as a repeal of the statute.

ARNITT
v.
GARNETT.

HOLROYD, J.:

The landlord is clearly entitled to his rent, unless he has waived his right. The statute expressly says that the goods are not to be removed unless the plaintiff pay the rent. It is true that no action would lie against the sheriff for any act done by him before he had notice of the landlord's claim; because, until such notice the sheriff could not be a wrong-doer, but as long as the money remained in the hands of the sheriff, the landlord's right was not gone, and notice having been given before the money was paid over to the plaintiff, I think the sheriff is responsible.

BEST, J. concurred.

Rule absolute.

OWEN v. LEGH AND BRODBELT.

(3 Barn & Ald. 470—473.)

1820.

[470]

A tenant, whose standing corn and growing crops have been seized as a distress for rent before they were ripe, cannot maintain an action upon the case under 2 W. & M. (sess. 1), c. 5, against the landlord or his bailiffs for selling the same before five days,† or a reasonable time, have elapsed after the seizure, such sale being wholly void.

DECLARATION stated, that Brodbelt as bailiff of Legh, and by his authority, on 29th of August, 1818, at, &c. seized and took the standing corn, growing turnips, growing potatoes, cattle, goods, and chattels, to wit, &c. of the plaintiff, of great value, to wit, of the value of 1,000*l.* then found and being in and upon a certain messuage, farm, lands, and premises, situate at, &c. in the name of a distress for certain arrears of rent pretended to be due and payable for the same to Legh, and then and there gave notice thereof to the plaintiff; yet that the said defendant,

† Extended to fifteen days by 51 & 52 Vict. c. 21, s. 6.

OWEN
v.
LEGH.

[*471]

*472]

afterwards and before the expiration of five days next after such distress so taken and made, and such notice thereof so given as aforesaid, and before a reasonable, proper, and convenient time in that behalf had elapsed, to wit, on, &c. at, &c. unlawfully did sell and dispose of the said cattle, standing corn, &c. without the leave or licence, and against the will of the said plaintiff, whereby he was not only hindered from replevying the same, but also deprived of reasonable time for raising money to pay the rent and the costs of the distress, *and also lost the cattle, standing corn, &c. and the use thereof. The second count only stated a seizure of standing corn, growing turnips, and growing potatoes, and a sale before the expiration of five days. Plea, general issue. The cause was tried at the last Spring Assizes for Chester, when it appeared that a distress had been made by the defendants, one of whom was the landlord of the plaintiff, on Saturday, August 29th; and that the sale of the goods distrained took place on the Tuesday following, which was admitted to be a day too soon,† and a violation of the statute 2 W. & M. sess. 1, c. 5, s. 2. The damages were assessed, not merely in respect of the goods and chattels so sold, but were also increased in respect of the standing corn and growing crops of turnips, which were sold before they were ripe. The jury found a verdict for the plaintiff, damages 90*l.* *D. F. Jones*, in last Easter Term, obtained a rule *nisi*, either for a new trial, or for a reduction of the damages to 50*l.*, being the amount applicable to the sale of the goods and chattels only; and he contended that the evidence as to the loss resulting from the sale of the standing corn and growing crops, was improperly received under the declaration as framed. By 2 W. & M. sess. 1, c. 5, growing crops could not be distrained; and the power given by the 11 Geo. II. c. 19, s. 8, was modified by different provisions. This sale, therefore, was not authorised by either Act, and no replevin was necessary. Besides, the declaration does not charge any grievance within 11 Geo. II.; for it is not alleged that the crops were not ripe, or that they were appraised after they were cut, *or that they were sold before they were appraised. The record here supposes the same provisions to be applicable to standing corn, under the 11 Geo. II.,

† *Wallace v. King*, 1 H. Bl. 13.

and to goods and chattels, under 2 W. & M. But the provisions and the damage are altogether different. The damage, in the one case, is the curtailing of the chance of replevying; and in the other, is the bringing of the crops to sale under circumstances of disadvantage and loss.

OWEN
v.
LEGH.

Cross, Serjt. and *Cottingham* shewed cause, and contended that by 11 Geo. II. c. 19, s. 8, the seizure of the standing corn was lawful, by the landlord, for rent in arrear; and by the latter part of that section, it is directed, that they are, in a convenient time, to appraise, sell, or otherwise dispose of the same, in the same manner as other goods and chattels. If so, as it is admitted, that the damage stated in the declaration would be sufficient in the case of other goods and chattels, it is so in this case.

J. Williams and *D. F. Jones*, *contrà* :

The sale here was wholly void as to the standing corn; for it cannot be sold till after an appraisement, and no appraisement can be made till it is ripe. Then, if the sale be void, the plaintiff has not sustained any damage from the act of sale; for nothing passed by it, and there was no necessity for any replevin on his part.

They were then stopped by the Court.

ABBOTT, Ch. J. :

It seems to me at present, that the sale of the standing corn was unauthorised, and that no necessity ever existed for replevying it. Now, the plaintiff has stated this as his damage in his declaration, *and has recovered damages in part on that account, which he ought not to have done; for notwithstanding this sale, it was clearly competent under 11 Geo. II. c. 19, s. 8, for the tenant, at any time before the corn was ripe, to have tendered the rent due; and if, after that, the landlord had taken the corn, he might have been proceeded against as a trespasser. We will, however, forbear giving our final judgment on this case at present, recommending the parties, in the mean time, to arrange the matter between themselves.

[*473]

Cur. adv. vult.

OWEN
v.
LEGH.

The cause having stood over till this Term, and the parties not having come to an agreement,

ABBOTT, Ch. J. now delivered the judgment of the Court :

We are of opinion, in the present case, that the plaintiff has no good cause of action, as to that part of the first count of the declaration, in which he complains of the sale of the standing corn and growing crops having been made before a reasonable time had elapsed ; for the sale being altogether void, the plaintiff sustained no legal damage from it, and has therefore no ground of action in respect of it. The rule, therefore, for a new trial must be made absolute, unless the plaintiff shall consent to reduce the damages to the sum of 50*l.* ; and, in that case, the verdict must be entered on that part of the first count which relates to the sale of the goods and chattels only.

Rule accordingly.

K. B. EASTER TERM.

1820.
April 21.
[489]

DOE, DEM. OF S. PERKES *v.* E. PERKES AND OTHERS.†
(3 Barn. & Ald. 489—492 ; S. C. Gow, N. P. 186.)

A testator being angry with one of the devisees named in his will, began to tear it, with the intention of destroying it ; and having torn it into four pieces, was prevented from proceeding further, partly by the efforts of a by-stander, who seized his arms, and partly by the entreaties of the devisee. Upon this he became calm ; and having put by the several pieces, he expressed his satisfaction that no material part of the writing had been injured, and that it was no worse : Held, that it was on these facts properly left to the jury to say whether he had completely finished all that he intended to do for the purpose of destroying the will ; and the jury having found that he had not, the Court refused to disturb the verdict, and supported the will.

EJECTMENT for messuages and lands in the parish of Walsall. Plea, not guilty. At the trial before Holroyd, J. at the last

† Followed in *Doe v. Harris* (1837) 6 A. & E. 109. The language of the Statute of Frauds (s. 6) in regard to de-

visees of lands is substantially adopted in regard to all wills by the 20th section of the Wills Act, 1 Vict. c. 26.—R. C.

Assizes for the county of Stafford, it was admitted that the lessor of the plaintiff, as the brother and heir at law of one Charles Perkes, deceased, was entitled to recover, unless the defendants could establish the will under which they claimed. The will had been duly executed by the testator to pass real property, and the only question was, whether he had not revoked it by tearing it, and upon that point it was proved by one Joseph Worrall, that in August, 1816, the testator, having had some quarrel with one of the parties who was a devisee named in his will, in a fit of passion, took his will out of his desk, and said to Worrall, "Joe, you shall see if I have done any thing for the rascal or not. I have made *him a gentleman." He then began to tear the will, and tore it twice through; the witness then laid hold of his arms and entreated him to abate his passion. The devisee, who was present, then put his hands together, as if in an attitude of prayer, and said, "Consider my family. I beg your pardon for what I have said. Had I been worthy to have known what had been done for me, I should have been satisfied." Upon this the testator became calm, and the witness let loose his arms. The testator then folded up the will, and put it in his pocket, and afterwards pulled it out again, and said, "It is a good job it is no worse," and after fitting the pieces together, he added, "There is nothing ripped that will be any signification to it." The will was found after the death of the testator, in four parts. Upon this evidence, the learned Judge left it to the jury to say whether the testator had done all he intended, or whether he was not prevented from completing the act of destruction he intended. The jury found a verdict for the defendants, establishing the will, and now

DOE
v.
PERKES.

[*490]

W. E. Taunton moved for a new trial, and contended that the cancellation was complete by the tearing of the will with the intent to destroy it, and he cited *Pemberton v. Pemberton*,† *Bibb v. Thomas*,‡ *Hyde v. Hyde*,§ and *Onions v. Tyrer*.||

ABBOTT, Ch. J. :

Upon the evidence, it appears, in the present case, that the

† 13 Ves. 290.

‡ 2 Black. 1043.

§ 1 Eq. Cases Abr. 403.

|| 1 P. Wms. 343.

DOE
v.
PERKES.
[*491]

testator, being moved with a sudden impulse of passion against one of the devisees under *his will, conceived the intention of cancelling it, and of accomplishing that object by tearing. Having torn it twice through, but before he had completed his purpose, his arms were arrested by a by-stander, and his anger mitigated by the submission of the party who had provoked him ; he then proceeded no further, and after having fitted the pieces together, and found that no material word had been obliterated, he said, “ It is well it is no worse.” Now, if the cancellation had been once complete, nothing that took place afterwards could set up the will. But it was a question for the jury to determine whether the act of cancellation was complete. They have found that it was not, and that it was the intention of the testator, if he had not been stopped, to have done more, in order to carry his purpose into effect. I can see no reason to think that verdict wrong.

BAYLEY, J. :

I think this verdict right. If the testator had done all that he originally intended, it would have amounted to a cancellation of the will ; and nothing that afterwards took place could set it up again. But if the jury were satisfied that he was stopped *in medio*, then the act not having been completed will not be sufficient to destroy the validity of the will. Suppose a person having an intention to cancel his will by burning it, were to throw it on the fire, and upon a sudden change of purpose, were to take it off again, it could not be contended that it was a cancellation. So here, there was evidence from which a change of purpose before the completion of the act, might properly be inferred. The jury have drawn that inference, and I see no reason to disturb the verdict.

[492] HOLROYD, J. :

I was of opinion, at the trial, that if the act of tearing was completed nothing that took place afterwards was sufficient to set up the will again. The Statute of Frauds says, “ that no devise in writing of lands shall be revocable, otherwise than by some other will, or by burning, cancelling, tearing, or obliterating the

same by the testator, &c. ;" but, in order to effect this, the act of tearing, &c. must be complete. I left it to the jury to say whether that was so, and they were of opinion that the testator had not completed the act he had intended, and I thought that they drew the right conclusion from the evidence.

DOE
v.
PERKES.

BEST, J. :

I am of opinion that the verdict is right. Tearing is one of the modes by which a will may be cancelled ; but it cannot be contended that every tearing is a cancellation ; for if it were, a testator, who took his will into his hands with intent to tear it, must, if he should tear it in the smallest degree and then stop, be considered as having cancelled it. The real question in these cases is, whether the act be complete. If the testator here, after tearing it twice through, had thrown the fragments on the ground, it might have been properly considered, that he intended to go no further, and that the cancellation was complete ; but here there is evidence, that he intended to go further, and that he was only stopped from proceeding by an appeal made to his compassion by the person who was one of the objects of his bounty. The case in Blackstone is very distinguishable : for there the testator completed his purpose, although the will was not destroyed. I see no reason, therefore, for disturbing the verdict.

Rule refused.

HORNCastle AND ANOTHER v. FARRAN.

(3 Barn. & Ald. 497—501 ; S. C. 2 Starkie, 590.)

1820.
April 24.

Where the owner of a ship, having a lien on the goods until the delivery of good and approved bills for the freight, took a bill of exchange in payment and though he objected to it at the time afterwards negotiated it : Held, that such negotiation amounted to an approval of the bill by him, and that it was a relinquishment of his lien on the goods.

[497]

TROVER for goods. Plea, not guilty. At the trial before Abbott, Ch. J. at the sittings after last Michaelmas Term, it appeared that the defendant was the secretary of the East India Dock Company, and the plaintiffs were the owners of the ship

HORNBASTLE *Kingston*. The ship had been chartered by them on a voyage to the East Indies and back. The freighter, Mr. Campbell, a merchant in London, bound himself by the charterparty to pay freight in the following manner: viz. 421*l.* in cash forthwith on the day of the clearance of the ship outwards; 421*l.* on that same day, by a good and approved bill at six months; a further sum not exceeding 1,000*l.* for charges, &c. to be paid at her port of delivery in the East Indies; a further sum for payment of wages of the crew on her arrival at the port of London, and the remainder thereof to be paid by a good and approved bill or bills payable in London at three months after date from the day on which the delivery of the said homeward cargo shall be completed. The ship completed her voyage, and arrived in the port of London, and, according to the regulations usual in such cases, delivered her cargo, which was placed part in the East India Company's warehouses, and part in the East India Dock Company's warehouses. On the 15th September, 1818, a notice was given to both these bodies by the plaintiffs not to deliver the goods to Campbell, until they received advice that the freight had been paid. All the payments during the voyage, including the payment of the wages of the crew, were duly made. The residue of the freight due amounted to 3,279*l.* 7*s.* 4*d.* On the 8th

[*498] *October, 1818, the plaintiffs received a bill at three months of 1,200*l.* drawn by the captain of the ship on and accepted by Campbell in part payment. And on the 21st October, 1818, the balance was received by them in other bills. On the 24th October, they sent an order to Campbell, authorising the stop on the goods in the East India Company's warehouses to be taken off; but, at the same time, refused to take off that on the other goods, alleging as a reason, that they could not succeed in negotiating the bill for 1,200*l.* dated October 8th. A further correspondence took place, but the plaintiffs continued to refuse to take off the stop until Campbell should give them a collateral security for this bill. Notwithstanding this refusal, the East India Dock Company, upon an indemnity being given to them, permitted Campbell's agent to remove the goods. It appeared that all the bills, including that for 1,200*l.*, had been negotiated by the plaintiffs. The LORD CHIEF JUSTICE, at the trial, held

that this circumstance put an end to the plaintiffs' lien on the goods, and directed a nonsuit. *Scarlett*, in last Hilary Term, having obtained a rule *nisi* to set this nonsuit aside, and for a new trial,

HORNCastle
v.
FARRAN.

Marryat (and *Gurney* was with him) shewed cause :

The negotiation of the bills was a relinquishment of the lien of the plaintiffs, supposing one even to have existed, because, otherwise, the plaintiffs would make Campbell liable to pay the bills to the holders, without giving him the power, by the sale of the goods, to provide for the payment. And there was no special agreement; for Campbell did not, as it appears, even know that the bills had been negotiated. But, secondly, there was no lien at all in this case. The clause in the East India Dock Company's *Act states, 54 Geo. III. c. 228, s. 18: "That all such wares and merchandizes landed and warehoused under the provisions of this Act, shall, when so landed and warehoused, continue subject or liable to such and the same claim for freight as such goods, &c. respectively were subject or liable to whilst the same were on board such ships, and before the landing thereof." Here, however, by the charterparty, the plaintiffs had no right to require any bills to be given till after the complete delivery of the homeward cargo. Then, if so, they never had a lien on the goods whilst on board the ship. And, if so, the Act gives them none whilst in the warehouse of the East India Dock Company. And he cited *Saville v. Campion*.†

[*499]

Scarlett and *Chitty*, *contra* :

The acts are to be concurrent, and the plain meaning of the charterparty is, that the goods shall be delivered on the giving of good and approved bills; and so it was ruled in the case of *Tate v. Meek*,† Easter Term, 1818, in the Common Pleas, upon a charterparty similar to the present. There was, therefore, a lien originally on the goods. Then the only material question is, has that lien been relinquished? That depends on this, whether this bill for 1,200*l.* can be considered as a good and approved bill.

† 21 B. R. 376 (2 B. & Ald. 503).

† 19 B. R. 518 (8 Taunt. 280;
2 Moore, 278).

HORNCASTLE
 v.
 FARRAN.
 [*500]

On the 24th October the plaintiffs distinctly objected to it, and on that express ground refused to give up their lien. Then, can the subsequent negotiation make any difference? If the bill is not to be negotiated, neither party gains any advantage. The bill is given for the purpose of negotiation; and if negotiated after having *been objected to, it is still not an approved bill. Until an approved bill be given, the lien continues. In the case of stoppage *in transitu*, that right is not lost by the acceptance and negotiation of a bill for the amount due.

ABBOTT, Ch. J. :

In the present case, it appeared that Campbell had a right to the delivery of the goods, upon his giving good and approved bills for the freight to the owners of the ship. Now, in order to obtain possession, he does deliver to them the bill in question; and, upon their expressing their disapprobation of it, he accedes to it, and at first acquiesces in their retaining possession of the goods. That, however, was done in ignorance of the fact of their having at that time negotiated the bill. I thought, at the trial, that the negotiation of the bill was to be taken as against the party negotiating it, as an approbation of the bill by him; and that the owners of the ship having, by this act, declared their approbation of the bill in question, had lost their lien on the goods. I am still of the same opinion, and I think, therefore, the nonsuit was right, and that this rule ought to be discharged.

BAYLEY, J. :

I am also of opinion, that the nonsuit in this case was right. It appears that Campbell having given the bill in question, the owners of the ship expressed their disapprobation of it. In consequence of this, the stop which had been placed upon the goods in the East India Company's warehouse continued, and it became necessary for Campbell, if he wished to get it removed, to give another bill. Under these circumstances, however, the owners chose to negotiate the original bill. Now, if Campbell had consented expressly *to this negotiation, and yet had agreed that the plaintiffs should retain their lien on the goods, he would, of course, have been bound by that agreement; but that was not

[*501]

the case; and if the plaintiffs negotiated the bill without such express consent on his part, it seems to me, that they gave up their lien on the goods. If we were to hold otherwise, the consequence would be this, that Campbell would be prevented from obtaining his goods, in order to enable him to take up the bill, and yet he might be arrested on it, and compelled to pay it. That would be a great inconvenience and hardship, and one which ought not to be imposed upon him without his express consent. I think, therefore, that as soon as this bill was negotiated by the plaintiffs, their lien on the goods was given up. The nonsuit, therefore, was right.

HORNCASTLE
v.
FARRAN.

HOLROYD, J.:

I am of the same opinion. The plaintiffs, in this case, acted on the bill as their own, by their first accepting, and afterwards negotiating it. They ought, if they disapproved it, to have given it back to Campbell. As to their having objected to it, I do not place much reliance upon that; for, though they objected to it in words, they approved it by their act; for, by negotiating it, they put it out of their power, afterwards, to return it to Campbell. I am, therefore, of opinion, that they had no further lien upon the goods, and that the nonsuit was right.

BEST, J. concurred.

Rule discharged.

WRIGHT v. CLEMENTS.†

(3 Barn. & Ald. 503—509.)

1820.
April 25.

Declaration stated that the defendant published a libel, containing false and scandalous matters concerning the plaintiff, *in substance* as follows; and then set out the libel with innuendoes: Held, that this was bad in arrest of judgment.

[503]

DECLARATION stated, that defendant contriving, &c. falsely, &c. did publish, and did cause and procure to be published, a certain

† Referred to in judgments, *Bradlaugh v. R.* (1878) 3 Q. B. Div. 607, 631; 38 L. T. 118; *Capital and Counties Bank v. Henty* (H. L. 1882) 7 App. Cas. 741, 743; 52 L. J. Q. B. 232.—R. C.

WRIGHT
v.
CLEMENTS.

[*504]

false, scandalous, malicious, and defamatory libel, in the form of a statement, purporting to be written by one William Cobbett, of and concerning the plaintiff, containing, amongst other things, certain false, scandalous, malicious, defamatory, and libellous matters, of and concerning the said plaintiff, *in substance*, as follows; that is to say: it then proceeded to set out the libel with innuendoes. The plaintiff having obtained a verdict for 500*l.* damages, at the Middlesex sittings after last Michaelmas Term, before Abbott, Ch. J. a rule was obtained in Hilary Term for arresting the judgment, on the ground that the declaration was defective in stating *the libel to be set out in substance only, and not according to the tenor. And now

Scarlett, Denman, and Chitty, shewed cause:

This rule was obtained on the authority of the case of *Newton v. Stubbs*.† There the declaration stated the words spoken to be to the effect following, and that was held to be bad in arrest of judgment. That case, however, does not apply to the present; for taking the whole declaration together, it appears that the very words of the libel are set out, for there are innuendoes which would be unnecessary, if the declaration purported to set out only the substance or effect. It is sufficient, at all events, after verdict, if the declaration imports to set out the substantial matter of the libel. In the *Queen v. Drake*,‡ Holt, Ch. J. says, “a libel may be described either by the sense or by the words, and therefore an information charging that the defendant made a writing containing such words, is good, and in such a case a nice exactness is not required because it is only a description of the sense and substance of the libel.” That is an authority to shew that it is sufficient to set out the substance of the libel. In *The King v. Bear*,§ the declaration purported to set out the libel according to the tenor and effect following, and it was held that although the words to the effect following, of themselves might be bad, yet that coupled with the word tenor, which imported a literal copy, they might be rejected. It is not, however, necessary to set out the literal copy of a libel, for the variance of a

† 2 Show. 435; 3 Mod. 71.

‡ 3 Salk. 225.

§ 2 Salk. 417; 1 Ld. Raym. 414,

S. C.

letter not altering the sense is immaterial, and that shews that it is sufficient *to set out the substance of the libel. Admitting it, however, to be necessary to give in evidence the precise words of the libel, it is sufficient, after verdict, that it should be so stated on the record that there is no positive repugnancy between the mode of stating it, and the necessity of proving the precise words. Now there is nothing in the words “in substance as follows,” which dispenses with the necessity of proof of the very words of the libel; for the innuendoes shew that the plaintiff undertakes to prove the precise words. In the course of the argument, they cited *Wood v. Brown*,† and *Rex v. Lee*fe.‡

WRIGHT
v.
CLEMENTS.
[*505]

Platt, contra :

The words “in substance as follows,” form a material part of the description of the libel, and cannot, therefore, be rejected. In actions for oral or written slander, it is not sufficient to set out the substance, but the very words must be stated upon the record, in order that the Court may judge whether they be actionable or not; if it were sufficient to set out the substance, the verdict of the jury would be conclusive upon that point, and the party would be deprived of his writ of error. In *Zenobio v. Axtell*,§ it was held to be insufficient, in an action for a libel written in a foreign language, to set out the translation, which, if correct, however, would have contained the substance of the libel. *Cook v. Cox*|| is precisely in point. The declaration there stated that the defendant accused the plaintiff of being in insolvent circumstances, without setting out the words, and the Court, upon argument, *held it to be bad, after verdict, upon principle and authority. This declaration cannot be supported.

[*506]

ABBOTT, Ch. J. :

I am of opinion, that in this case the objection must prevail, and that the judgment must be arrested. In actions for libel, the law requires the very words of the libel to be set out in the

† 16 R. R. 597 (1 Marsh. 522; § 3 R. R. 142 (6 T. R. 162).
6 Taunt. 169). || 15 R. R. 432 (3 M. & S. 110).
‡ 11 R. R. 683 (2 Camp. 134).

WRIGHT
v.
CLEMENTS.

declaration, in order that the Court may judge whether they constitute a ground of action; and unless a plaintiff professes so to set them out, he does not comply with the rules of pleading. The ordinary mode of doing this, is to state that defendant published, of and concerning the plaintiff, the libellous matters, to the tenor and effect following. In that case the word "tenor" governs the word "effect," and binds the party to set out the very words of the libel. There is another mode of doing it, by stating that defendant published the libellous matters following; that is to say. And in this case, also, it is understood that the very libel is set out. Here, however, more words have been introduced into the declaration, and the question is, whether the additional words have not varied the sense. The allegation here, which has departed from the common form of the precedents, is, that the defendant published certain libellous matter, in substance as follows. Now the question is, whether the words "in substance," do not give a different meaning to the passage which follows. It seems to me that they do; for we are to understand these words in their ordinary sense. Suppose a person were to say, I have read a book concerning certain interesting historical questions, in which is contained a passage, in substance as follows; no man would understand him to be about to repeat the very words of the passage, but only that he was about to give an abstract of it. So it is that I understand this declaration. It is true, that in pleading, many words have obtained an appropriate and technical sense, different from their popular meaning; and if that had been the case with the words "in substance," it might have varied the present question: but it is not so, and those words must, therefore, be understood in their ordinary sense. I think, therefore, that the plaintiff in his declaration, not having professed to set forth the very words of the libel, but only their substance and effect, and, as it were, a sort of abstract of them, the judgment must be arrested. It is of great importance to follow the ancient form of precedents; for if we depart from them in one instance, one deviation will naturally lead to another, and, by degrees, we shall lose that certainty which it is the great object of our system of law to preserve.

[*507]

BAYLEY, J. :

WRIGHT
C.
CLEMENTS.

I am of the same opinion. A defendant, in a case like this, has a right to expect that the plaintiff, in his declaration, will set out the very words used, or so much of them as he means to rely upon ; and the usual mode of doing this has been already stated by my LORD CHIEF JUSTICE. The word “tenor” has, in law, a peculiar and technical sense, and the distinction between it and “substance” is distinctly pointed out by BULLER, J. in *Rex v. May*,† where he says, that “the word tenor has so strict and technical a meaning, as to make it necessary to recite *verbatim*; but that by the expression, “manner, and form following,” used in that case, nothing more than a substantial recital was requisite.” Here it is stated that defendant published *certain false and libellous matters, in substance as follows ; the latter words, therefore, qualify those which precede, and would let the party in at *Nisi Prius* to looser proof than would have been required in case the declaration had stated the libel *verbatim*. Then, if the law requires the libel itself to be stated, how can a declaration be sufficient which states the libel in substance only? For two statements, which may differ in words, may agree in substance. Besides, if it be sufficient to set out a libel in substance, who is to decide whether it is proved, the Judge or the jury? And if they differ, the defendant might be deprived of the judgment of the Court out of which the record comes. I think, therefore, that if we were to hold this declaration sufficient, we should relax the strictness of proof at present required, and depart from the unvaried course of all the precedents. The judgment, therefore, must be arrested.

[*508]

HOLBOYD, J. :

I am of the same opinion. The old form of declaring was to state the libel “according to the tenor and effect following,” or, “according to the tenor following.” And the law attaches a technical meaning to the word “tenor,” as signifying either an exact copy or a statement of the libel *verbatim*. If the usual mode be not followed, but new words substituted for these expressions, the Court must understand those new words according to

† Dougl. 193.

WRIGHT their popular and ordinary sense. And considering this case in
v.
CLEMENTS. that way, the words "in substance," mean not a literal copy of
the libel, but only the general import and effect of it. Now
where a charge, either civil or criminal, is brought against a
[*509] defendant, arising out of the publication of *a written instru-
ment, as is the case in forgery or libel, the invariable rule is,
that the instrument itself must be set out in the declaration or
indictment; and the reason of that is, that the defendant may
have an opportunity, if he pleases, of admitting all the facts
charged, and of having the judgment of the Court, whether the
facts stated amount to a cause of action, or a crime. For it is
clear that when it can be shewn distinctly what the instrument
is upon which the whole charge depends, that instrument must
be shewn to the Court, in order that they may form their judg-
ment. A defendant is not bound to put the question as a com-
bined matter of law and fact to the jury, but has a right to put
it as a mere question of law to the Court. This mode of declar-
ing would not only deprive him of that advantage, but also of his
writ of error; and it would make the verdict of a jury binding
in cases where it ought not to be so. For if the jury find the
verdict that the libel proved was in substance the same as the
charge in the declaration, contrary to the opinion of the Judge,
that would be binding upon the parties, and the defendant could
bring no writ of error, even although the whole might be a
question of law. I think, therefore, that this declaration is bad,
and that the judgment must be arrested.

Rule absolute.†

† BEST, J. was absent at the Old Bailey.

HAWKER AND ANOTHER v. HAWKER AND OTHERS.
(3 Barn. & Ald. 537—545.)

1820.
April 28.

[537]

A testator, by his will, devised all his real estates in several parishes to trustees, their heirs and assigns, for ever, upon trust to sell his estate at H. to pay his debts; and in case it should not be sufficient, then, as to his estate at F. upon trust, to sell that also, to make good the deficiency; but in case it should not be necessary, then, as to his estate at F. and his other remaining estates in trust to receive the rents and profits till his daughter came of age, and then to pay such of the rents and profits as had not been applied to her maintenance and education, together with the surplus money arising from the sale of his estate at F., if it should be sold, to his daughter, upon coming of age, and from that period to the use of the trustees for the life of his daughter, and after her death to the use of her children; and by a codicil to his will, in which he made an alteration as to the trustees, the testator devised to the new trustees therein named, and to the survivors and survivor of them, and the heirs of such survivor, "such estates as aforesaid, in trust as aforesaid." It appeared that the estate at H., when sold, was alone sufficient to pay the debts: Held, that the trustees, and the survivors and survivor of them, and the heirs of the survivor, took only an estate for the life of the daughter in the remaining estates at F. and elsewhere.

THE VICE-CHANCELLOR sent the following case for the opinion of this Court: Edward Baker, late of Hill Court, in the parish of Grafton Flyford, in the county of Worcester, Esq. deceased, was, at the time of making and publishing his last will and testament, and from thence to the time of his decease, seised in fee-simple of several messuages, lands, tenements, and hereditaments, situate in the several parishes of Grafton Flyford, North Piddle, and Flyford Flavel, in the county of Worcester. And being so seised, he duly made and published his last will and testament in writing, bearing date the 3rd day of July, 1802, and which was duly executed and attested as by law is required for devising real estates, and thereby gave and devised unto the defendants, Benjamin Johnson and George Penrice, and to John Symonds, Esq. since deceased, and Henry Wakeman, therein described, all and singular his freehold estates in the several parishes of Grafton Flyford, North Piddle, and Flyford Flavel, or elsewhere in the kingdom of Great Britain, to hold to them, their heirs and assigns for ever, upon trust that they should, as soon as convenient after his decease, sell and dispose of his *estate, lands,

[*538]

HAWKER
v.
HAWKER.

being part of the said hereditaments; and by and with the money arising from such sale should pay off and discharge all his just debts; and in case it should not produce a fund sufficient for that purpose, then, as to all those his messuages, farms, lands, tenements, and hereditaments, situate, lying, and being in the parish of Flyford Flavel, in the county of Worcester, upon trust to sell and dispose thereof, and by and out of the money arising from the sale thereof to dispose of as much of the principal money as would be sufficient to make good the payment of his debts; and to pay, apply, and dispose of the surplus money as was thereafter directed. But in case it should not be necessary to dispose of the same as aforesaid, then as to, for, and concerning his estate at Flyford Flavel, Grafton Flyford, North Piddle, or elsewhere, in trust to receive the rents, issues, and profits thereof, during the minority of his daughter, the defendant, Mary Hawker; but in the mean time, and until she attained her age of twenty-one years, to pay and apply so much of the rents and profits of the said premises as his said trustees, or the survivors or survivor of them, or his heirs, should think fit, together with the interest or produce of any surplus money arising from the sale of his estate at Flyford Flavel, should the sale of such estate be found necessary, for the maintenance and education of his daughter Mary, until she should have attained her said age of twenty-one years. And he thereby directed that the said trustees should, when and as soon as his said daughter should have attained the age of twenty-one years, render to her a joint account of and concerning the said monies and trust-
[*539] estates, *and of the rents, issues, and profits thereof, after all just allowances made; or, if it should be necessary to make sale of the Flyford estate for the purpose aforesaid, of all surplus money remaining in their hands, with interest thereon, and pay the same accordingly. And from and immediately after his said daughter should arrive to the age of twenty-one years, then, as to his said estates, to the use and behoof of the said Benjamin Johnson, John Symonds, Henry Wakeman, and George Penrice, their heirs and assigns, for and during the natural life of his said daughter Mary, for preserving and supporting the contingent uses and remainders thereafter limited from being defeated and

destroyed. And, for that purpose, to make entries and bring actions as occasion should require. But, nevertheless, to permit and suffer his said daughter, and her assigns, to receive and take the rents, issues, and profits thereof, and of every part and parcel thereof, for her and their own use, for and during the term of her natural life. And from and immediately after the death of his said daughter Mary, then to the use and behoof of all and every the children of his said daughter Mary, lawfully begotten, share and share alike, to hold as tenants in common, and not as joint-tenants. And in case his said daughter should happen to die under the age of twenty-one years, and without issue, then his will was, and he thereby ordered and directed his said trustees should account with and pay the balance due on the aforesaid trust account unto and to the use of such person as should by that his will be next in remainder, and entitled to his aforesaid estates and hereditaments, after the decease of his said daughter. And in case she should die before she arrived at the age of twenty-one *years, or, surviving, should die without lawful issue, then, as to his aforesaid estates, to the use and behoof of his nephew, Wm. Flindall, of Colchester, in the county of Essex, and to the heirs male of his body lawfully issuing, successively in tail male as they should happen to be in seniority of age, and of the several and respective heirs male of their several and respective bodies issuing, the elder of such son and sons, and the heirs male of his body, being always preferred before the younger of such son and sons, and the heirs male of his body. And for default of such issue, then he gave all his said lands, tenements, and hereditaments unto his cousin John Paine, to hold to him, his heirs and assigns for ever.

HAWKER
*
HAWKER.

[*540]

The said testator, Edward Baker, duly made and published a codicil to his said will, bearing date the said 3rd day of July, 1802, and which was duly executed and attested as by law is required for devising real estates, and thereby declared that to be a codicil to his last will and testament. And as to, for, and concerning the devise of the said estates in remainder to his nephew, William Flindall, in tail to his male issue, he revoked that part of his will, and declared the same to be in trust for all and every his the said William Flindall's children, share and share alike,

HAWKER
v.
HAWKER.

as tenants in common and not as joint-tenants, if such contingency should happen, and their father had been next in remainder, with full power to his said trustees to sell such estates, and divide the money amongst them. The said testator, Edward Baker, duly made and published another codicil to his said will, dated the 17th day of March, 1804, and which was duly executed and attested as by law is required for devising real estates, and thereby, after *reciting that he did, on or about the 3rd day of July, 1802, duly make and execute his last will and testament in writing, and therein and thereof did nominate, constitute, and appoint Benjamin Johnson, John Symonds, Henry Wakeman, and George Penrice, executors and trustees. And, after reciting the said codicil hereinbefore set forth, the said testator devised to his said trustees and executors, and to the survivors and survivor of them, and the heirs of such survivor, such estates as aforesaid, in trust as aforesaid. And he did revoke the nomination and appointment of the said Henry Wakeman to be a trustee and executor under his said will, and in the room and stead thereof did nominate, constitute, and appoint the defendant, Richard Nash, jointly with the said Benjamin Johnson, John Symonds, and George Penrice, trustee and executor under his will; and in all other respects he ratified and confirmed the same, with the codicil thereto, and declared that to be another codicil to his said will. The said testator, Edward Baker, departed this life on or about the 18th day of September, 1806, without having revoked or altered his said will, save as the same was revoked or altered by the said two codicils, and without having revoked or altered his said codicils, save as the former was revoked or altered by the latter. And the said testator left the said defendant, Mary Hawker, his only child and heiress-at-law, and the said John Symonds hath since departed this life. No part of the said hereditaments in Flyford Flavel hath been sold, it not being necessary to sell the same for the payment of the said testator's debts. The said defendant, Mary Hawker, intermarried with the said defendant, Charles Hawker, in the month of August, 1807, and afterwards, and on *the 9th day of September, 1811, attained her age of twenty-one years. The question for the opinion of the Court of King's Bench was, What estate do the said defendants,

[*541]

[*542]

Benjamin Johnson, George Penrice, and Richard Nash, take in the said hereditaments in Grafton Flyford, North Piddle, and Flyford Flavel, by virtue of the said will and codicils of the said Edward Baker.

HAWKER
v.
HAWKER.

Blake, for the plaintiffs, contended, that the object of the testator would be best accomplished by holding that the trustees took an estate for the life of Mary Hawker, with a power of sale in case of necessity as to the estate of Flyford Flavel. As to the other estates, the uses declared were to the trustees during the life of Mary Hawker, and after her death to her children; and there was nothing to be done by the trustees after the death of Mary Hawker. There is nothing, therefore, which makes it at all necessary that the trustees should take any estate beyond her life. The words in the will as to the sale of Flyford Flavel were conditional. The testator only directed a sale in case the estate at Himbleton should not prove sufficient, he expressly contemplates the probability of no such necessity existing; and, therefore, in the event of its not being required, gives it to the same uses as the other estates; until the necessity arose, the estate should pass to the persons for whom the uses were declared, a power of sale only immediately vesting in the trustees as in the case of a devise that land should be sold by executors; *Gilbert on Uses*, 127. The present case is like that of *Lady Jones v. Say and Sele*.† The trustees are to *have no greater estate than is necessary for the purposes of the trusts; *Doe dem. White v. Simpson*.‡ If it be held that the trustees take the whole fee, then the daughter will take an equitable estate for life, with an equitable remainder to her children; and, considering “children” as a word of limitation, this will give her an estate tail which she may destroy by recovery; whereas, if the trustees take an estate for her life only, there will be a legal remainder to her issue, and this will not give her an estate tail, but will preserve the property for the children.

[*543]

Treslove, contra :

If this question stood on the will alone, the case of *Lady Jones*

† 3 Br. P. C. 127; 8 Vin. Ab. 262. ‡ 5 East, 162; 1 Smith, 383.

HAWKER
v.
HAWKER.

v. *Say and Sele* would be a strong authority for the plaintiff's argument, that these trustees have the legal estate during the life of the daughter, and that after that event the legal estate would be in the children. The only difference between the two cases is, that in *Lord Say and Sele's* case the will contained an express declaration, that the devisees shall "stand and be seised," which are the identical words of the Statute of Uses. But the real question is on the second codicil, by which the estates are given to the devisees, and to the survivors and survivor of them, and the heirs of such survivor. Now, as it cannot be ascertained who the survivor will be, the devisees cannot take a vested fee: they take only a joint estate for their lives, with a contingent remainder in fee to the survivor, as was admitted in *Vick v. Edwards*.† In order to execute a use the party must be seised, the word "seised" being the only word used in the Statute of *Uses. Here the devisees are not seised of the fee, by reason of the contingency to the survivor, and therefore no use in fee is executed; and although they are seised for a joint estate for their lives, a use cannot be executed out of this seisin to themselves, their heirs and assigns, "during the life of the daughter," which are the words used in the will. The form of devise used in the second codicil is inconsistent with the execution of a use under the will: not only the fee is devised in contingency, but the testator adds, "in trust as aforesaid," meaning strictly a trust, and not a use. The consequence is, that no use is executed; but the trustees take a joint estate for their lives, with a contingent remainder in fee to the survivor.

[*544]

Blake, in reply :

Such a construction of the codicil cannot be adopted. It would prejudice the power of sale given to the trustees, for they could not convey a clear fee to a purchaser: all that they could do would be to bar the heirs of the survivor by a fine operating as an estoppel. The title to the fee must be left, in effect, in abeyance during their lives. This the Court would, if possible, avoid. It is immaterial whether there was a seisin here co-extensive with the use: there may be such a seisin in the case of a deed,

† 3 P. Wms. 372.

but not in the case of a will. In the case of a deed, the Court is governed wholly by the Statute of Uses; but in the case of a will the Court acts under the Statute of Wills, taking a rule of construction from the Statute of Uses, and therefore holding the legal estate vested by devise in the person in whom the use would be executed, if the conveyance were by deed. It is therefore settled, that a devise to the use of A. vests the legal estate in A., though there *is no seisin created to feed that use. The question, therefore, is, for whom was the first use or trust declared? Now, the codicil devises the estates on the same trusts as the will; therefore, the effect of the codicil was to give the same estates as the will; and it is admitted in the argument on the other side, that the will gave the estates which the plaintiff contended for, namely, an estate in fee in the estate at Himbleton, and an estate for the life of the daughter in the others. If the codicil altered the will in the way suggested by the defendants, then the trustees would not take a fee in Himbleton, though it were expressly devised to be sold out and out; and they would be thus unable to carry into effect any of the declared intentions of the testator.

HAWKER
v.
HAWKER.

[*545]

The following Certificate was afterwards sent :

“ This case has been argued before us by counsel ; and we are of opinion that Benjamin Johnson, George Penrice, and Richard Nash, take to them, and the survivors and survivor of them, and the heirs of the survivor, only an estate for the life of the testator’s daughter Mary, in Grafton Flyford, North Piddle, and Flyford Flavel.

“ C. ABBOTT,

“ J. BAYLEY,

“ G. S. HOLROYD,

“ W. D. BEST.”

1820.
May 2.

DOE, ON THE DEMISE OF KING AND WIFE v.
CATHERINE FROST.†

[546]

(3 Barn. & Ald. 546—556.)

A testator having a son and daughter, and the latter having several children, devised his lands, &c. to his son W. F. in fee ; and if he should have no children, child, or issue, the said estate was, on the decease of W. F., to become the property of the heir-at-law, subject to such legacies as W. F. might leave to the younger branches of the family : Held, that W. F. took, under this will, an estate in fee, with an executory devise over to the person, who on the happening of the event contemplated by the will, should become the heir-at-law of the testator.

EJECTMENT for certain premises, situate in the county of Cambridge. At the trial, before Abbott, Ch. J. at the last Summer Assizes for that county, the jury found a special verdict, which stated the following facts. William Frost, being seised in his demesne, as of fee, of and in the manor of Brinkley, in the county of Cambridge, and of certain lands and tenements in the several parishes of Brinkley, Wellingham, Carlton, and Westley, in the said county, being the manor, lands, and tenements in the said declaration mentioned, and which said premises were all purchased at one time by the said W. Frost, and were altogether legally conveyed to him by one conveyance, by his will on the 6th day of April, 1805, duly made and executed, so as to pass freehold estates, amongst other things, devised as follows ; that is to say ; “ I give and bequeath to my well-beloved son, William Frost, of the parish of Brinkley and county of Cambridge, farmer, and his heirs for ever, all my houses and lands, with all their appurtenances thereunto belonging ; also I give to my well-beloved wife Rebecca Frost, the sum of 100*l.*, yearly and every year, during her natural life, to be paid her by the afore-said W. Frost, half-yearly, out of the estate ; and if the said W. Frost should have no children, child, or issue, the said estate is, on the decease of the said W. Frost, to become the property of the heir-at-law, subject to such legacies as he the said

† Followed in *Coltman v. Coltman* (1868) L. R. 3 H. L. 121. Compare *Doe v. Spratt* (1833) 5 B. & Ad. 731, where there were no words of

contingency, and the will was read as giving a vested remainder to the heir-at-law of the testator.—R. C.

W. Frost may leave by will to any of the younger branches of the family." After making the said *will, to wit, on the 25th day of August, 1807, the said W. Frost, the testator, died so seised as aforesaid, of the premises in the will mentioned, being also the premises in the declaration mentioned, and without having revoked or altered his will, and leaving Rebecca, his wife, him surviving, and leaving issue of his body, lawfully begotten, namely, William Frost, the devisee named in the will, his only son and heir-at-law, and Rebecca, the wife of Robert King, in the said declaration mentioned, and no other issue. W. Frost the younger, the devisee in the will mentioned, had been in the possession of the estate devised to him by his father, the said W. Frost, the testator, a certain space of time, to wit, for seven years before his father's decease, and became seised thereof on the death of his said father, and continued so seised thereof until and at the time of his death. After the death of the said W. Frost the father, the said W. Frost the younger, still continuing seised of the premises aforesaid, in the said declaration mentioned, by his last will and testament, duly made, so as to pass freehold estates, on the 10th day of July, 1810, devised, amongst other things, as follows; that is to say, first, "I do, as far as I lawfully or equitably may or can, by virtue and in pursuance of the last will and testament of my late father W. Frost, of the parish of Wooddithen, and county of Cambridge, farmer, deceased, bearing date the 6th day of April, 1805, give, devise, and bequeath the following legacies, to be issuing and payable out of all his houses and lands, with all their appurtenances thereunto belonging, which, in and by his said last will and testament, he gave and bequeathed to me and my heirs for ever; and who, by his said last will, gave to his well-beloved wife, Rebecca Frost, the sum of *100*l.* of good and lawful money, yearly and every year during her natural life, to be paid her by me half-yearly out of the estate; and if I should have no children or issue, the said estate was, on my decease, to become the property of the heir-at-law, subject to such legacies as I might leave by will to any of the younger branches of the family; that is to say, to my niece Rebecca Frost King, the daughter of Robert King and Rebecca his wife, my sister, the

DOE
v.
FROST.
[*547]

[*548]

DOE
v.
FROST.

sum of 1,000*l.* of lawful money of the United Kingdom of Great Britain and Ireland, current in England. To my nephew James King, the son of the said Robert King and Rebecca his wife, the sum of 4,000*l.* of such like lawful money as aforesaid. To my niece Matilda King, the daughter of the said Robert King and Rebecca his wife, the sum of 1,000*l.* of such like lawful money as aforesaid; and to my nephew John Lyles King, the son of the said Robert King and Rebecca his wife, the sum of 2,000*l.* of such like lawful money as aforesaid. Also, I give and devise unto my wife Catherine, all and every my manors, messuages, lands, tenements, and hereditaments, whatsoever and wheresoever, with their and every of their rights, members, and appurtenances; to hold to her my said wife, her heirs and assigns, for ever." On the 26th day of October, 1818, the said William Frost, the younger, died, seised of the premises in the declaration mentioned, without having revoked or altered his said will, leaving the said Rebecca King, in the said will mentioned, and in the said declaration also mentioned, the wife of Robert King, in the said declaration also mentioned, his sister and heir-at-law. After the death of William Frost the younger, and before the time of the trespass *in the said declaration mentioned, the said Catherine Frost, widow of William Frost the younger, in the will of the said William Frost the younger mentioned, and the defendant in this suit, entered upon the premises mentioned both in the will of William Frost, the father, and also in that of William Frost the younger, and continued in the possession of the same. Rebecca King had lawful issue, to wit, an eldest son named William King, and four other children, all of whom were living at the time of the making of the will of William Frost, the first testator, and who are also now living. William Frost the younger was, at the time of making his will, seised in fee of other estates besides those devised to him by his father, but of no other manor than the manor of Brinkley. The special verdict then proceeded in the usual way to state the lease, entry, and ouster by the defendant.

[*549]

Sugden, for the lessors of the plaintiff, made two points, first, that the estate which W. Frost the younger took under his

father's will was an estate in fee, with an executory devise over, in case of his death without issue, to the person who should then be the collateral heir of the family. In that case the estate, in the event which has happened, has descended on Mrs. King, his sister. The words of the will are, "I give to my son W. F. and his heirs for ever, all my houses and lands, &c. Also, I give to my wife 100*l.* a year, to be paid by W. F. half-yearly out of the estate; and if the said W. F. should have no children, child, or issue, the said estate is, on the decease of the said W. F. to become the property of the heir-at-law, subject to such legacies as he the said W. F. may leave by will to any of the *younger branches of the family." Here the estate was to go over on the decease of W. F., and subject to legacies to be devised by him. It is clear, therefore, that this does not point to an indefinite failure of issue, but only to a failure of issue at the time of W. F.'s decease. In that case the executory devise over is good; *Porter v. Bradley*.† * * But, secondly, supposing the true construction of the father's will to be, that the son took an estate tail, with the reversion in fee to himself afterwards, still the estate, not having been disposed of by his will, descends upon his sister as the heir-at-law. It will be contended on the other side, that it passed to his widow under the general words of the devise to her. *But it may clearly be shewn, that it was not his intention to pass them under these words; for he begins by adverting to the property he took under his father's will, and he calls that property "*his lands*," &c. He then, after reciting his father's will, by which the estates were to go to the heir-at-law at his (the son's) decease, executes the power given to him of devising, by giving legacies to the four younger children of his sister. It is clear, therefore, as far as language can speak, that he supposed the estate was to go over on his death to his sister, by which means the eldest son, whom he omits altogether as a legatee, would be provided for. Then it is that he devises afterwards to his wife in these words: "All *my manors, messuages*," &c. He meant, therefore, clearly, only to leave to her the property of which he died seised, independently of that derived under his father's will; and, as to that he died intestate,

DOE
v.
FROST.

[*550]

[*551]

† 1 R. R. 675 (3 T. R. 143).

DOE supposing him to have had the right of disposition of it.
 v. * * *
 FROST.

[552] *Shadwell, contra :*

William Frost, under his father's will, took an estate tail, with the reversion in fee, either under the will, or, if undisposed of by the will, then it descended on him as heir-at-law. * * *

[554] *Sugden*, in reply, was stopped by the COURT.

ABBOTT, Ch. J. :

It appears to me, in this case, to have been the plain intention of the testator, that, at the period of the decease of his son, William Frost, it should be ascertained, whether the estates devised to him by the will, should then vest in him in fee absolutely, or pass over to some other person, subject to such legacies as the son might, by his will, devise to any of the younger branches of the family. Now, at the time when the testator made his will, it appears, that besides his son, William Frost, he had a married daughter, Rebecca King, who had five children. It is clear, therefore, that her younger children would be "the younger branches of the family," mentioned by the testator in his will. I think, therefore, that the plain intention of the testator was, that at the time of William Frost's death, without children, the estate should go over to the person who should then be the heir-at-law, with a power, however, to William Frost, in that event, to leave legacies to the younger children of his sister, Rebecca King. The *lessors of the plaintiffs are, therefore, entitled to recover.

[*555]

BAYLEY, J. :

I am of the same opinion. If the Court see by the whole frame of the will, that the estate is to continue in the first devisee, so long as he has any lineal descendants, it will follow, that the gift to him is of an estate tail. But if the will gives it to him in fee, there may be then an executory devise over, on the happening of a particular event. Here the will gave the estates to William Frost, and his heirs for ever, and if he had no

DOE
v.
FROST.

children, child, or issue, the estate was, on his decease, to become the property of the heir-at-law. It does not seem to me, that this contemplates a devise over on an indefinite failure of issue, but only on the failure of issue at the time of William Frost's death. And the subsequent part of the clause confirms me in this opinion, for, if the will had given an estate tail, with the reversion in fee, to William Frost, it would have been wholly unnecessary to have given to him the specific power of charging the estate with legacies. Then who is the heir-at-law in favour of whom the executory devise is to take effect. The circumstances of the family were these. The testator, besides his son, William Frost, had a daughter, Rebecca King, who had five children. It seems to me, therefore, that by these words in his will, he meant to give the estate, in case William Frost died without leaving issue at the time of his death, to Rebecca King, if she should survive her brother, or, if not, then to her eldest son; but with power, in either event, to William Frost, to leave legacies out of the estate to the younger children of his sister. This construction, as it seems to me, will give complete effect to the testator's will, and the words *subject to such legacies, &c. may properly be read, as if in a parenthesis. I think, therefore, that William Frost, under the will took an estate in fee, with an executory devise over (in the event of his dying, leaving no issue living at his death) to such person as should, in that event, be the heir-at-law of the testator. The plaintiff is, therefore, entitled to our judgment.

[*556]

HOLROYD, J. :

By the first part of the will, the testator appears to have given an estate in fee to William Frost, his son, but he then adds, that if he should have no children, child, or issue, the estate should, on his decease, become the property of the heir-at-law, subject to such legacies as he, William Frost, might leave to any of the younger branches of the family. Now it is clear, that if it appeared, by the subsequent limitation, that the estate was to go over upon an indefinite failure of issue, the previous estate in fee given, would be converted into an estate tail. But I think, in the present case, that the estate was not to go over upon an

DOE
v.
FROST

indefinite failure of issue; for the contingency is, that the estate is, if William Frost had no children, child, or issue, at his decease, to go over to the heir-at-law. The will, therefore, contemplates a failure of issue at the decease of William Frost, and the estate in fee is not converted, by the subsequent limitation, into an estate tail. I agree, also, that by the expression "the heir-at-law," is meant, the person who, at the time of the decease of William Frost without issue, should then be the heir-at-law of the testator.

BEST, J. concurred.

Judgment for the plaintiff.

THE KING *v.* HENRY HUNT, JOHN KNIGHT,
JOSEPH JOHNSON, JOHN THACKER SAXTON,
JAMES MOORHOUSE, JOSEPH HEALY, SAMUEL
BAMFORD, ROBERT JONES, GEORGE SWIFT,
AND ROBERT WILD.

1820.
May 8.
[566]

(3 Barn. & Ald. 566—576.)

Upon an indictment against A. B. and others, for unlawfully meeting together with persons unknown, for the purpose of exciting discontent and disaffection, it was held, (A. B. having presided at this meeting,) that resolutions passed at a former meeting assembled a short time before, in a distant place, and at which A. B. also presided, and the avowed object of which meeting was that of the meeting mentioned in the indictment, were admissible in evidence to shew the intention of A. B. in assembling and attending the meeting in question.

A copy of these resolutions, delivered by A. B. to the witness at the time of the former meeting, as the resolutions then intended to be proposed, and which corresponded with those which the witness heard read from a written paper, is admissible without producing the original.

Large bodies of men having come to this meeting from a distance, marching in regular order, resembling a military march, it was held to be admissible evidence to shew the character and intention of the meeting, that within two days of the same, considerable numbers were seen training and drilling before day-break, at a place from which one of these bodies had come to the meeting; and that on their discovering the persons who saw them, they ill-treated them, and forced one of them to take an oath never to be a King's man again: Held, also, that it was admissible to shew in evidence, for the same purpose, that another body of men in their progress to the meeting, on passing the house of the person who had been so ill-treated, expressed their disapprobation of his conduct by hissing.

Parol evidence of inscriptions and devices on banners and flags displayed at a meeting, is admissible, without producing the originals.

Upon such an indictment, evidence of the supposed misconduct of those who dispersed the meeting is not admissible.

THIS was an indictment against the defendants, and the first count stated, that the defendants, being malicious, seditious, and ill-disposed persons, and intending to disturb the peace and common tranquillity of the realm, and to excite discontent and disaffection, and to excite the subjects of our lord the King, to hatred of the Government and Constitution, on the 1st of July, and on divers other days and times, at Manchester, did conspire together, with divers other persons unknown, unlawfully to meet together, and to cause a great number of other persons to meet

THE KING
v.
HUNT.

[*567]

with them at a certain place in the said county, for the purpose of disturbing the peace, &c. and for the purpose of exciting discontent, &c. and for the purpose of exciting the subjects to hatred, &c. And that defendants, and said other conspirators, in pursuance of said conspiracy, on 16th August, at *Manchester, unlawfully did meet together, and did cause, aid, and assist in causing divers subjects to a large number, to wit, sixty thousand and more, unlawfully to meet together for the purposes aforesaid, at a certain place in the said county, in a formidable and menacing manner, and in military array, with clubs, sticks, and other offensive weapons, and with divers seditious ensigns, and with flags, banners, and placards, bearing divers seditious inscriptions and devices. To the great terror of the subjects, to the evil example, &c. and against the peace, &c. The second and third counts were also for a conspiracy. Fourth count; that defendants being such persons, &c. unlawfully did meet together, with divers other persons unknown, to a large number, to wit, sixty thousand, for the purpose of exciting discontent and disaffection, and for the purpose of exciting the subjects to hatred of the Government and Constitution, in contempt, &c. There was a count for a riot. Plea, Not guilty.

At the trial before Bayley, J. at the last Assizes for the county of York, it appeared, that on the 21st July, 1819, the defendant, Hunt, had presided at a meeting in Smithfield, one of the chief objects of which was, to consider the means of obtaining a reform in Parliament. At that meeting, resolutions of a seditious tendency were passed, the defendant, Hunt, having put the resolutions from the chair. On the 31st July, a notice of a meeting, the notice being dated the 23rd July, and purporting to be signed by eleven persons, inhabitants of Manchester, appeared in a newspaper at Manchester, by which the public were informed that a meeting would be held on the 9th August, on the area near St. Peter's Church, to take into consideration the most speedy and effectual *mode of obtaining "a radical reform in the Commons House of Parliament, and also to consider the propriety of the unrepresented inhabitants of Manchester electing a person to represent them in Parliament." And it announced, that H. Hunt, Esq. was to be in the chair. The magistrates having given

[*568]

notice that this meeting was illegal, another notice, purporting to be signed by the same persons, appeared in the same paper, stating, that they had been advised that a meeting, for the purpose of electing a person to represent the inhabitants of Manchester in Parliament was illegal, and that such meeting would not therefore be held. In the same paper, however, a notice appeared, dated the 6th August, "that a public meeting would be held on the area, near St. Peter's Church, on Monday, the 16th, to consider the propriety of adopting the most legal and effectual means of obtaining a reform in the Commons House of Parliament, the chair to be taken by the defendant, Hunt, at 12 o'clock. In pursuance of this last notice, the meeting assembled on the 16th, and the defendant, Hunt, appeared upon the hustings, but before any resolutions were proposed, the meeting was dispersed, and the defendant, Hunt, and others, were taken into custody. On behalf of the prosecution, the resolutions passed at Smithfield were given in evidence, and the tenor of them was proved by a copy produced by a witness, to whom that copy had been delivered by the defendant, Hunt, at the time of the Smithfield meeting, as the resolutions intended to be there proposed. The witness also swore, that the resolutions he heard read, corresponded with the copy so delivered to him. It was objected, by the defendants, that this was not sufficient evidence of the tenor of the resolution, inasmuch as the *original paper from which they were read, ought to have been produced or the defendants ought to have had notice, at least, to produce it, in order to let in the secondary evidence; and secondly, that the resolutions themselves were not admissible at all, inasmuch as there was no evidence to shew, that it was intended to propose the same resolutions at the meeting at Manchester. The learned Judge over-ruled the objections, and received the evidence. It appeared also that large bodies of persons, who attended the meeting at Manchester, on the 16th, came from a distance, organized, and with a regularity of step and movement, resembling that of a military march, and that one of these bodies came from the neighbourhood of a place called White Moss, and evidence was given, that, on the 14th August, a witness had seen at White Moss, before day-break, a number of persons

THE KING
v.
HUNT.

[*569]

THE KING assembled, practising the marching step, and that these persons,
HUNT. upon seeing the witnesses, had ill-treated them, and called them spies, and extorted from one of them an oath, never to be a King's man again, or to name the name of a King. And it was proved, that some of the parties who entered Manchester, on the 16th, in military order, on passing the house of the witness, who had been so ill-treated, expressed their disapprobation of him by hissing. It was objected, by the defendants, that this was not admissible evidence against them, inasmuch as it did not appear that the meeting at White Moss took place with the knowledge or concurrence of any of them. The learned Judge overruled the objection, and received the evidence. It appeared, also, that at the meeting of the 16th, there were various flags and banners, containing inscriptions and devices, of a seditious and inflammatory tendency, and that these *were seized by the police officers on the dispersion of the mob; these inscriptions and devices were described by the several witnesses, from memory. It was objected, by the defendants, that the flags or banners ought to have been produced, or that, in order to entitle the prosecutors to give secondary evidence, the defendant ought to have had notice to produce the originals. The defendants also tendered evidence to prove, that various acts of outrage were committed upon the people assembled, by the military, on the dispersion of the meeting. The learned Judge refused to receive this evidence. The trial occupied ten days at York, and the defendants, Hunt, Knight, Bamford, Healy, and Johnson were found guilty, upon the fourth count of the indictment. The other defendants were acquitted, and application having been made for a new trial, after the reading of the evidence, which occupied the time of the Court for several days in this term, the defendant, Hunt, on behalf of himself and the others, contended, that there ought to be a new trial, on the ground that improper evidence had been received against him, and that evidence tendered on the part of the defendants at the trial had been refused, and he renewed the objections made at the trial; and he further urged, that the learned Judge had misdirected the jury as to the effect of the evidence.

[*570]

Cur. adv. vult.

ABBOTT, Ch. J.:

THE KING
v.
HUNT.

Although this matter has occupied a considerable portion of that time and attention which is dedicated to the administration of justice, it has not presented to my mind any doubt whatever; and I will deliver my opinion upon the several points with as much *brevity as possible. The first objection taken by the defendants was, as to the rejection of the proposed evidence of the misconduct of the military. This supposed misconduct took place at the dispersion of the assembly, and was, in my opinion, irrelevant to the matters in issue. The matters in issue were the intention and object of the assembly, and, upon the count for a riot, the conduct of the persons assembled prior to their dispersion. Now the conduct of those who dispersed the assembly could have no bearing upon the intention and object of the assembly, because those must have existed before the dispersion, and were, in their nature, perfectly distinct from the conduct of those who afterwards dispersed the assembly. Neither was the conduct of the dispersers relevant to the demeanour of those who had previously assembled; and nothing that was properly applicable to shew the demeanour of the persons assembled was rejected. On the contrary, witness after witness was called and heard, to speak to the propriety of their demeanour, up to and at the time of the arrival of the military among them; and up to and at the period spoken to by one of the witnesses examined for the prosecution, who gave his opinion and reasons for sending in first the yeomanry, and afterwards the regular cavalry. No witness was rejected who was offered to speak to facts, contradictory to the matters deposed to by that person, or by any other witness examined for the prosecution. It appears to me, therefore, that the proposed evidence relating to the conduct of other persons in a matter subsequent was properly rejected. But if this were more doubtful than it appears to me to be, with reference to the whole charge originally preferred against the defendants, still that doubt would be altogether removed by *the verdict, which having narrowed the offence of the defendants to the fourth count, which charges an unlawful assembly, for the purpose of exciting discontent and disaffection, and does not charge any actual or intended violence, has, in my opinion,

[*571]

[*572]

THE KING
v.
HUNT.

unquestionably rendered the proposed evidence irrelevant, as having no bearing upon that charge. The second point of objection is, to the admission of the resolutions of the Smithfield meeting. The objection here is two-fold: first, that the best evidence was not produced; and, secondly, that no evidence of them was admissible. Now the paper produced was proved to have been received from the hands of one of the present defendants, at the time and place of passing the resolutions, as containing the very resolutions then actually in progress, and then in the act of being passed by or proposed to the persons assembled, and as against the party to whom this proof applied, the paper produced was as good, if not better evidence than any other could have been. On the second part of the objection, it is to be observed, that these resolutions were proposed at a large assembly, very recently held for some alleged purpose of parliamentary reform, which was the avowed purpose of the meeting at Manchester, at which previous assembly one of the defendants had presided, and put the question (if, indeed, any question can be deemed to be effectively propounded on such an occasion) which defendant, a stranger in point of residence or other than political connection with Manchester or its vicinity, was announced as the invited chairman, and actually became the chairman at the meeting in question. Under such circumstances, upon the question of intention, I have no doubt that it was competent to shew, as against that individual, that, at a similar

[*573] *meeting, held for an object professedly similar, such matters had passed under his immediate auspices. I have no doubt of the competency of such evidence; its effect was for the consideration of the jury, and was properly left to them. It was, in its nature, a declaration, by that defendant, of his own sentiments and views, with reference to what is called parliamentary reform, and to the assembling of large numbers of persons to hear speeches and resolutions under that pretext. The third objection was to the reception of that evidence which regarded the training at White Moss, and the assault there committed. The case submitted to the jury by the present indictment presented two questions. First, the general character of the assembly: as in all cases of conspiracy, or other unlawful acts in which many

THE KING
v.
HUNT.

persons are concerned. And, secondly, the particular case of each individual charged, as connected with the general character, supposing the general character to be such as that its criminality might in the result be a fit matter for the consideration of the jury. Now it was shewn that a very considerable part of the persons assembled, or at least a very considerable part of those who came from a distance, went to the place of meeting in bodies to a certain extent arranged and organised, and with a regularity of step and movement resembling those of a military march, though less perfect. The effect of such an appearance, and the conclusion to be drawn from it, were points for the consideration of the jury, and no reasonable person can say that they were left to the consideration of the jury in a manner less favourable to the defendants than the evidence warranted. And if this appearance was in itself proper for the consideration of the jury, it must *have been proper to shew to them that at the very place from which one of those bodies came, a number of persons had assembled before day-break, and had been formed and instructed to march as soon as there was light enough for such an operation; and that some of the persons thus assembled had grossly ill-treated two others, whom they called spies, and had extorted from one of them, at the peril of his life, an oath never to be a King's man again, or to name the name of a King; and that another of the bodies that went to the place of meeting, expressed their hatred toward this person by hissing as they passed his door. These matters were, in my opinion, unquestionably competent evidence upon the general character and intention of the meeting. Their effect as to each particular defendant was, as I have already observed, a distinct matter for the consideration of the jury. With respect to the last point, the reception of the evidence as to the inscriptions on the flags or banners, I think it was not necessary either to produce the flags or to give notice to the defendants to produce them. The cases requiring the production of a writing itself will be found to apply to writings of a very different character. There is no authority to shew that in a criminal case ensigns, banners, or other things exhibited to public view, and of which the effect depends upon such public exhibition, must be produced or

[*574]

THE KING
v.
HUNT.

[*575]

accounted for on the part either of the prosecutor or of the defendants. And in many instances the proof of such matters from eye-witnesses, speaking to what they saw on the occasion, has been received, and its competency was never, to my knowledge, called in question until the present time. Inscriptions used on such occasions are the public expression *of the sentiments of those who bear and adopt them, and have rather the character of speeches than of writings. If we were to hold that words inscribed on a banner so exhibited could not be proved without the production of the banner, I know not upon what reason a witness should be allowed to mention the colour of the banner, or even to say that he saw a banner displayed, for the banner itself may be said to be the best possible evidence of its existence and its colour. And if such parol proof may be received generally, the proof at this trial was properly received, notwithstanding the allegation that the things themselves, or some of them, were in the hands of a constable then at York ; for, in the first place, this fact did not appear (if indeed it appeared at any time distinctly) until after the evidence was received ; and, in the second place, if it had appeared distinctly at the time when the parol evidence was offered, still that particular fact would not affect the competency of the other proof, such other proof being competent upon general principles. Its proper effect would only be to furnish matter of observation to the jury on the part of the defendants, that the prosecutor chose to offer only the fallible testimony of witnesses where he had it in his power to produce the infallible testimony of the things themselves. Although, however, for the purpose of the present objection, it is assumed that some of the banners actually displayed in St. Peter's Fields were in the hands of a constable at York, yet if, instead of offering the parol evidence, that person had been called as a witness to produce them, the prosecutor might have been further required to prove that the things produced were the things displayed, and might have been required

[*576]

to deduce them *from hand to hand ; and if there had been a failure in any one step, the thing must have been rejected, supposing its production to be the only proof. The difficulty of such a deduction, and the impossibility that must occur in

many cases, of either producing the things themselves, or of shewing what has become of them, shews the unreasonableness of requiring the proof of the things themselves, and of rejecting the testimony of eye-witnesses in a matter of public exhibition on an occasion like the present. The evidence of these banners and inscriptions was properly admissible to shew the general character and intention of the assembly; their application to the particular defendants was matter for the consideration of the jury, and was left to the jury in that way. Having disposed of these objections as matters of law, I shall take no further notice of the observations addressed to us upon what has been called misdirection in the effect given to this or that particular point, either of proof adduced, or of proof supposed to be deficient, than to say generally, that it appears to me that no observation was made to the jury unsuitable to the matter to which it was applied; that the whole effect of the evidence was most properly left to them, and that they were not desired or directed to draw, nor have in fact drawn, any presumption or conclusion against the defendants, which was not well warranted by the evidence adduced against them.

THE KING
v.
HUNT.

BAYLEY, HOLROYD, and BEST, JJ. concurred.

Rule refused.

THE KING v. THE INHABITANTS OF CASTLE
MORTON.

(3 Barn. & Ald. 588—590.)

1820.
May 10.
[588]

An agreement in writing, unstamped, for letting a tenement at a certain rent, having been lost: Held, that parol evidence of its contents was not admissible for the sake of proving thereby the value of the tenement.

SARAH BEDWARD, widow, and her two children, were removed, by order of two justices, from the parish of Tewkesbury in Gloucestershire, to the parish of Castle Morton in Worcestershire. On appeal, the Sessions confirmed the order, and stated the following case for the opinion of this Court:

James Bedward, the husband of the pauper, being settled by

THE KING
v.
THE INHAB-
ITANTS OF
CASTLE
MORTON.

[*589]

hiring and service in Castle Morton, afterwards took a tenement in the parish of Longdon, in the county of Worcester, of one Miss Poole; the terms of the taking were contained in a written agreement, unstamped, which was lost. James Bedward, after residing on the tenement about half a year, gave Miss Poole 3*l.* to be off the bargain, and entered into a fresh agreement with *Mr. Percent, the landlord of Miss Poole, who accepted him as tenant in her stead. The appellants, to prove the value to have been 10*l.* or upwards, offered parol evidence of the contents of the unstamped agreement, which had been lost, in order to prove the amount of rent agreed for between Bedward and Miss Poole, which parol evidence the Court refused to admit.

[After argument, in which *Rippiner v. Wright* (21 R. R. 363) and *Dover v. Maestaer* (5 Esp. 92) were cited:]

ABBOTT, Ch. J. :

[*590]

The promissory note was there (in *Dover v. Maestaer*) admitted in evidence, on the ground that the defendant, who had been in that case guilty of a crime, should not be allowed to relieve himself from the consequences of it by such an objection. And so in the case of forgery, a prisoner cannot object that the forged instrument, when produced, cannot be given in evidence for want of a proper stamp. But this case is very different; for the parties here seek to shew the value of a tenement by the *proof of a contract previously entered into respecting it. The contract was not therefore, in this case, collateral, but of the very essence of the case. Nor can it be introduced as a declaration; for it is a declaration made under such circumstances as prevent its being admitted in evidence.

Order of Sessions affirmed.

MELVILLE AND ANOTHER *v.* HAYDEN.

(3 Barn. & Ald. 593—595.)

1820.
May 12.

[593]

A guaranty of the payment of A. B. to the extent of 60*l.* at quarterly account, bill two months, for goods to be purchased by him of the plaintiff, is not a continuing or standing guaranty to that extent for goods to be at any time supplied to A. B. until the credit is recalled.

ASSUMPSIT. The plaintiff declared, upon a contract, to guarantee the payment of goods furnished by the plaintiffs to Amos Moulden. Plea, general issue. The guarantee was as follows: "Memorandum, 23rd September, 1818, I engage to guarantee the payment of Mr. Amos Moulden to the extent of 60*l.* at quarterly account, bill two months, for goods to be purchased by him of William and David Melville." At the trial at the sittings in this Term, before Abbott, Ch. J. at Guildhall, the guarantee was proved. It appeared that there had been a delivery of goods for three quarterly accounts, all of which had been satisfied by Moulden: the default was made by him in the fourth quarterly payment, for which the action was brought. It appeared that in the first quarter goods to the amount of 59*l.* 4*s.* had been furnished, and in the second and third quarters to a greater extent. The learned Judge thought at the trial, that the guarantee was at an end before the goods were furnished for which the action was brought; and directed a nonsuit, giving to the plaintiff leave to move to enter a verdict *for 60*l.* in case the Court should be of a different opinion. And now

[*594]

Marryat moved for a rule *nisi*:

This was a continuing guarantee. Here the expression is "quarterly account;" which, therefore, does not mean one quarter's account only, but an account once in each quarter, and, therefore, implies a dealing for more than one quarter of a year. And besides, it is not for goods to the extent of 60*l.*, but to the extent of 60*l.* for goods. The fair construction therefore of it is this, that it was a guarantee to the plaintiffs for their furnishing goods to Moulden upon certain terms, provided that the extent of the liability was not, in any one quarter, to exceed 60*l.*; and *Mason v. Pritchard*,† is an authority to shew that a

† 11 R. R. 369 (12 East, 227).

MELVILLE guarantee to a party for any goods he hath or may supply my
HAYDEN. brother W. P. with, to the amount of 100*l.* is a continuing
guarantee until the credit is recalled; and that case is very
similar to the present.

ABBOTT, Ch. J. :

I had no doubt at the trial that this was not a continuing guarantee, and that it was applicable only to the first quarterly payment after it was given. I am still of the same opinion; and I think there is no ground for granting the present rule.

BAYLEY, J. :

I am of the same opinion. The words "quarterly account," do not seem to me to vary the case; they only mean that at whatever time the goods might have been delivered, the account for them should be rendered quarterly. A party who takes a guarantee of this sort, should carefully provide that there are
[*595] *words in it expressive of its being a guarantee for goods to be furnished by him from time to time. In the case of *Mason v. Pritchard* that was the case. The words there were "for any goods he hath or may supply;" so that there the guarantee was applicable to any goods furnished at any time, to the amount of 100*l.*, whatever intervening payments might have taken place. They were, therefore, equivalent to the words "any goods furnished from time to time." In this case, however, I think there was no continuing guarantee, and therefore this rule must be refused.

HOLROYD, J. :

The guarantee in this case does not go so far as that in *Mason v. Pritchard*; but was fully satisfied as soon as goods to the amount of 60*l.* had been purchased, and did not extend to such goods as might be purchased by him from time to time of the plaintiffs. The nonsuit, therefore, was right.

BEST, J. :

I think the case of *Mason v. Pritchard* went as far as possible; but that case is distinguishable from the present. There the

words were "for any goods;" here no such expression is to be found. The words "quarterly account" do not affect this question: they were introduced, as it seems to me, only to prevent the plaintiffs from calling for payment at so early a period as they might otherwise have done, for the goods furnished under the guarantee. It ought to appear unequivocally that it was the intention of the defendant to guarantee Moulden's payments, for goods to be furnished from time to time. I cannot collect that from the present guarantee. The rule, therefore, must be refused.

MELVILLE
v.
HAYDEN.

Rule refused.

K. B. TRINITY TERM.

LODGE AND ANOTHER v. DICAS AND RONDEAU, GENT.†

(3 Barn. & Ald. 611—615.)

1820.
June 3.

[611]

Upon the dissolution of a partnership, a creditor also treats the continuing partners or partner as his debtors, does not necessarily abandon his right to resort to a retired partner for payment.

ASSUMPSIT for work and labour. The defendant, Dicas, pleaded the general issue, and Rondeau suffered judgment to go by default. At the trial before Abbott, Ch. J. at the London sittings after last Hilary Term, the following appeared to be the facts of the case: The two defendants, who were attornies, had been in partnership together at the time when the debt was contracted. Disputes having arisen between them, they agreed to dissolve their partnership, and it was arranged between them that

† It is to be observed that much of the reasoning in *Lodge v. Dicas* is overruled by *Thompson v. Percival* (1834) 5 B. & Ad. 925, and *Lyth v. Ault* (1852) 7 Ex. 669, 21 L. J. Ex. 217. But, as appears by the observations of Lord Justice LINDLEY,

Partnership, 6th ed. p. 250, the case cannot be treated as altogether overruled. The limited proposition for which the case is stated by the Lord Justice to be still authority is now substituted for the original head-note.—R. C.

LODGE
v.
DICAS.

[*612]

Rondeau should receive the partnership debts and discharge the plaintiffs' demand. The plaintiffs had, however, no other knowledge of any arrangement between the parties than was given them *by a letter from Rondeau, dated 8th June, 1818, which was as follows: "We have been arranging our accounts, and Mr. Dicas and myself have agreed that I should take the amount of your account on myself, which I will be responsible for to you." Upon receiving this letter the plaintiffs expressly agreed to exonerate Dicas from all liability as to the partnership account, and stated that they should charge it to Rondeau's private account, he having continued to employ them as his agents. Some time afterwards Rondeau became embarrassed in his circumstances, and the present action, in Easter Term, 1819, was commenced against both defendants. At the trial, ABBOTT, Ch. J. was of opinion, that these facts did not amount to a good defence, and the plaintiffs had a verdict. *Scarlett* having, in last Hilary Term, obtained a rule *nisi* for a new trial,

[After argument:]

[613] ABBOTT, Ch. J.:

[*614]

Even if it had been distinctly proved in this case that the plaintiffs were acquainted with the fact, that Rondeau, by virtue of the arrangement between him and the defendant, Dicas, was to receive the debts due to the partnership, and take upon himself the payment of this demand, I should still have had great doubt whether the plaintiffs had released Dicas; but in *the absence of that proof, I am clearly of opinion that there is no defence to the present action. All that Dicas says is, that he will not interfere with Rondeau's collecting the partnership debts. But there is no evidence whatsoever,—except the expression in Rondeau's letter of the 8th of June, 1818, in which he says, "We have been arranging our account, and Mr. Dicas and myself have agreed that I should take the amount of your accounts to myself,"—from whence it can be fairly concluded that the plaintiffs knew at all of any arrangement between the parties. That letter was clearly not sufficient to shew them the nature and terms of such arrangement; and unless that

knowledge be brought home to them, there can be no doubt whatsoever in the present case.

LODGE
v.
DICAS.

BAYLEY, J. :

It is quite clear that originally the plaintiffs had a right of action against both Dicas and Rondeau; and the only question is, whether Dicas has been discharged by the plaintiffs from it. It is for the defendant, Dicas, to shew how he was discharged. A release is one mode; another is satisfaction. It is clear that the former has not been given, and an agreement by the plaintiffs to abandon a claim, unless there be a consideration shewn, is a mere *nudum pactum*. Now what consideration is there in the present case? If, indeed, it had formed part of the agreement, that Rondeau should continue to employ the plaintiffs as his agent, it might have been different; for that would have been a benefit to them. Undoubtedly, however, there may be a consideration arising out of a detriment to the defendant; and it is said that the allowing Rondeau to collect the partnership debts was a detriment to Dicas, and *might, therefore, be a good consideration for the plaintiffs' promise. But there is no evidence that that fact was known to the plaintiffs; and unless that be so, it can form no consideration for the promise in the present case. The plaintiff, therefore, there being no consideration at all for the promise, is remitted to his original right of action.

[*615]

HOLROYD, J. :

I am of opinion that the plaintiff's right of action is not gone by the circumstances existing in this case. It was proved at the trial that there was an agreement that Rondeau should receive the partnership debts, and discharge this demand. Such an arrangement, however, will not deprive the plaintiffs of their original right of action, unless it amounts to satisfaction. In this case the plaintiffs gain no fresh security by having Rondeau as their debtor; and unless it could have been shewn that they were parties to the agreement between Dicas and Rondeau, there is no consideration whatsoever for the promise proved to have been made. Whether in case such an agreement had been proved, and they had been parties to it, it would have amounted

LODGE
v.
DICAS.

to a release, or a covenant not to sue, is a question not now necessary to be determined. This rule, therefore, must be discharged.

Rule discharged.†

1820.
June 3.

GUERREIRO v. PEILE AND ANOTHER.‡

(3 Barn. & Ald. 616—618.)

[616]

A factor has an authority to sell for money, but not to barter. And therefore where a factor bartered the goods of his principal, no property passed, and the principal may maintain trover against the party with whom the goods are bartered, although the latter be wholly ignorant that he had been dealing with a factor only.

TROVER for 25 pipes of wine: plea, not guilty. At the trial before Abbott, Ch. J. at the London sittings after Hilary Term, the following appeared to be the facts of the case: The plaintiffs, who were merchants resident at Oporto, in May, 1818, consigned the wines in question for sale to Burmester and Vidal, who were merchants resident in London. They employed one White, a broker, to sell the same; and he, on the 29th October, by their orders, made the two following contracts with the defendants, which were both written on the same sheet of paper: "Bought 29th October, 1818, for Messrs. Burmester and Vidal, of Messrs. Sol. Peile and Son, 65 puncheons of Jamaica rum, of good clear merchantable quality, of average 15 per cent. over proof, 4s. 1d. per gallon; coopered and fitted up free on board; no bill to be drawn; the quality to be approved to-morrow. Sold 29th October, 1818, for Messrs. Burmester and Vidal, to Messrs. Sol. Peile and Son, 25 pipes of port wine, vintage 1815, 53l. per 138 gallons, housed and all charges paid; no bill to be drawn; but this being considered a barter transaction for the above 65 puncheons rum, the balance is to be paid in cash: as these wines have not been tasted by Messrs. Peile and Son, this contract to be void if not approved of to-morrow." White did not know that

† BEST, J. was absent from indisposition.

‡ It does not appear that the effect of this case is altered by the Factors Acts, unless it could be main-

tained that the transaction was a "disposition of the goods . . . in the ordinary course of business of a mercantile agent." See Factors Act, 1889, sections 1 and 2.—R. C.

Burmester and Vidal were only factors in this transaction; nor was there any evidence to shew that the defendants knew that fact. In pursuance of these contracts Burmester received the rums, and the defendants the wines, and a balance was paid to the latter upon the two transactions. In February, 1819, *Burmester and Vidal became bankrupts, without having accounted to the plaintiffs for the proceeds of the wine. White proved that he had been frequently concerned in similar transactions of barter; and other witnesses proved that it was not an uncommon practice among principals to barter one species of goods for another. It was contended by the plaintiff that Burmester and Vidal, being merely factors, had authority to sell only in the usual way for money, but not to barter; and consequently that by these contracts no property had passed to the defendants. The LORD CHIEF JUSTICE told the jury that if they were of opinion that Peile & Co. knew Burmester and Vidal to be factors, they should find for the plaintiff; and supposing that they did not know that fact, if the jury thought that this was a transaction in the ordinary course of trade when parties are dealing with their own commodities, they would find for the defendant. The jury found a verdict for the defendant. *Scarlett* in last Easter Term obtained a rule *nisi* for a new trial, on the ground that the factor in this case had exceeded his authority by bartering, and consequently that no property passed to the vendor; and he cited *Anonymous*,† and *Wiltshire v. Sims*.‡

GUERREIRO
v.
PEILE.

[*617]

The *Solicitor-General*, *Gurney*, and *Puller*, now shewed cause:

The jury have found that this was a transaction in the usual course of trade; and if so, it is clear that the principal was bound. Although this appears to be a case of barter, it really constitutes two distinct contracts of sale; a sale of the rums by Peile, and a sale of the wines by Burmester and Vidal.

ABBOTT, Ch. J. :

[618]

My learned brothers think that I ought to have told the jury upon these facts that this was a transaction of barter, and that

† 12 Mod. 514.

‡ 10 R. R. 673 (1 Camp. 258).

GUERREIRO the plaintiff's property was not divested, because a factor has no
v.
PEILE. authority to barter; and I am also of that opinion. This rule
must therefore be made absolute.

BAYLEY, J. :

I am of the same opinion. Burmester and Vidal had authority only to sell, and that for money, to be forthcoming to the plaintiffs. But in this case not one farthing of money would ever be forthcoming to the plaintiffs; for the amount due for the rums exceeded the value of the wine.

HOLROYD, J. :

I am of opinion that Burmester and Vidal had no authority to barter. In looking at this transaction we must look at the real nature of the thing, not at the colour given to it by the parties. If this had been a sale in market overt, the case might have been different; but that not being so, the principle of *caveat emptor* applies, and the person buying is bound by the authority which the person has who sells. Where a factor sells the goods of his principal, it is his duty to keep that sale wholly unconnected, and not to mix other matters with it to the detriment of his principal; and therefore the rule for a new trial must be made absolute.

Rule absolute.†

Scarlett, Marryat, and Parke, were to have argued in support of the rule.

† BEST, J. was absent from indisposition.

SHORT v. M'CARTHY.†

(3 Barn. & Ald. 626—632.)

1820.
June 5.

[626]

Declaration in assumpsit stated as a breach, that the defendant did not diligently and sufficiently make a search at the Bank of England to ascertain whether certain stock was standing in the name of certain persons, the defendant having been employed as an attorney so to do. The omission to search took place more than six years before action brought, although it was not discovered by the plaintiff till within the six years. Held—the Statute of Limitations having been pleaded—that upon this form of declaration, the plaintiff was not entitled to recover.

On the discovery being made, the defendant said the neglect arose from the omission of his clerk, and that he was responsible: Held, that upon this record, such an acknowledgment was not sufficient.

THE declaration stated, that before the making of the promise on the 1st November, 1812, it had been represented to the plaintiff, that one Joseph Bennyworth did, by his will, bequeath unto John Watkins and Aaron Powell, 700*l.* Five per cent. Bank Annuities, standing in his name, in the books of the Governor and Company of the Bank of England, upon trust, to permit his wife to receive the dividends during her life; and, after her decease, to transfer the same to such persons as one Mary Shaun should direct. The declaration then stated, that Bennyworth died without altering his will, and that Elizabeth Bennyworth was living, and entitled to the produce of the Bank Annuities, during her life, and that Mary Shaun had power to sell the same, subject only to the life interest of Elizabeth Bennyworth; and that it had been proposed, that Mary Shaun should, in consideration of 340*l.*, to be paid to her by the plaintiff, sell and dispose of the said Bank Annuities, subject to the life estate; and thereupon in consideration that the plaintiff, at the request of the defendant, had retained and employed him, then being an attorney of this Court, for reasonable fees and reward to him in that behalf, to ascertain whether the said sum of 700*l.* Five per cent. Bank Annuities, was standing in the books of the Bank of England, in the names of J. Watkins and A. Powell, or of any other person, for the benefit of Elizabeth Bennyworth, *during her life, and for

[*627]

† This case is confirmed by *Howell* J. in *Gibbs v. Guild* (1881) 8 Q. B. D. 296, 302.—R. C.
v. Young (1826) 5 B. & C. 259; and referred to as an authority by *FIELD*,

SHORT
v.
M'CARTHY.

that of such person, on her decease, as Mary Shaun should direct. The defendant undertook, and promised the plaintiff, to perform and fulfil his duty in the premises. Breach, that although it was the duty of the defendant diligently and sufficiently to search at the Bank of England, in order to ascertain whether such sum 700*l.* Five per cent. Bank Annuities was standing in the names of J. Watkins and A. Powell, or either of them, at the Bank of England, he, defendant, did not diligently and sufficiently search at the Bank for that purpose, but afterwards falsely represented and affirmed to the plaintiff, and caused the plaintiff to believe, that the sum of 700*l.* Five per cent. Bank Annuities was standing in the names of the said J. Watkins and A. Powell, for the benefit of Elizabeth Bennyworth, during her life, and for the benefit of such persons, on her decease, as Mary Shaun should direct; by reason whereof, defendants paid to Mary Shaun the said sum of 340*l.* as the consideration for the purchase of her interest in the said supposed sum of 700*l.* Five per cent. Bank Annuities, whereas in truth and in fact, the said sum of 700*l.* Five per cent. Bank Annuities was not standing in the names of John Watkins and Aaron Powell, or in the name of either of them, or in the name of any person, for the benefit of Elizabeth Bennyworth, during her life, and of such persons, on her decease, as Mary Shaun should appoint, so that the defendant lost his 340*l.*, and was put to great charges and expenses. Plea, first, general issue. Secondly, that the cause of action did not accrue within six years. At the trial, before Abbott, Ch. J. at the London sittings after last Hilary Term, it appeared in evidence, that in December,

[*628]

1812, the plaintiff, having *agreed to give 340*l.* for the 700*l.* Bank Annuities, to Mrs. Shaun, for her interest in the stock, applied to the defendant, who was an attorney, for the purpose of having the bargain carried into effect. The instructions stated by the witnesses to have been given, were, that the defendant should see that every thing was right. The deeds were accordingly prepared and executed at the time, and the money was then paid by the plaintiff. It subsequently turned out, that no enquiries had been made at the Bank of England, and that there was no such stock standing in the trustees' names, to which Mrs. Shaun was entitled. This discovery was made in August,

1818, and the defendant, on being then applied to, said that it was owing to an omission of his clerk, and that he was responsible. The jury found a verdict for the plaintiff. *Scarlett* in last Easter Term, having obtained a rule *nisi* for setting aside this verdict, and for entering a nonsuit,

SHORT
v.
M'CARTHY.

Tindal now shewed cause, and contended, first, that the cause of action did not accrue, till the period of the discovery of the defendant's negligence by the plaintiff, which was admitted to have been made in August, 1818. If this be not so, it will only require a certain degree of caution to prevent the discovery of the negligence for the period of six years, and then the party will be wholly without a remedy. In *Bree v. Holbeck*,† it is laid down, that in cases of fraud, the Statute of Limitations only runs from the time when the fraud is discovered. That principle ought to govern the present case. In *Battley v. Faulkner*‡ the breach was known to the plaintiff more than six years before the commencement of the suit, *which affords a distinction from the present case. But at all events, the subsequent promise takes this case out of the statute. The maxim of the law is *quilibet renunciare potest juri pro se introducto*; and here the defendant has waived his right of insisting on the defence given by the statute. *Dickson v. Thomson*§ shews the difference between an acknowledgment and a promise. This is the case of a promise, and that distinguishes it from *Boydell v. Drummond*.||

[*629]

Scarlett and Chitty, contra :

The reason why the subsequent promise takes the case out of the statute is, that the previous debt forms a good consideration for it, and so enables the party to declare upon that subsequent promise. But here the party has not declared upon the subsequent, but on the original promise, which was a very different one. The evidence, therefore, if the subsequent promise be relied on, does not support the declaration. *Boydell v. Drummond* is a distinct authority to shew, that an acknowledgment like the

† Doug. 654.

‡ *Ante*, p. 390.

§ 2 Shower, 126.

|| 10 R. B. 450 (11 East, 142; 2 Camp. 157).

SHORT
C.
M'CARTHY.

present is not sufficient. Here there is no fraud on the part of the defendant, but only negligence, and the doctrine to be found in *Bree v. Holbeck* does not apply ; and the decision of the Court there is precisely in point for the defendant. The circumstance of knowledge can make no difference. In ejectment, a party is barred after an omission to sue for twenty years. But in most cases, that omission arises from his ignorance of the validity of his claim. The statute which makes some exceptions, does not mention want of knowledge as one, and the Court, therefore, will not introduce it now for the first time.

[630] ABBOTT, Ch. J. :

This is an application to enter a nonsuit ; and, upon full consideration I am of opinion that a nonsuit ought to be entered. If the plaintiff can consistently with the rules of law rely upon the subsequent promise, he may do so, upon a new declaration specially framed for that purpose. But I am of opinion that he cannot do so upon a declaration in this form. If his want of knowledge of the actual injury sustained, till within the period of six years anterior to the commencement of this action, be sufficient, it will be competent for him to avail himself of that hereafter. Upon the present declaration, I cannot say that the cause of action there stated arose within six years before the commencement of the present action ; for the cause of action there stated is the omission of the defendant to make due inquiries at the Bank. Leaving it, therefore, open to the plaintiff to avail himself of these points, in case he shall be advised to bring a fresh action, I am of opinion, that, in the present case, a nonsuit must be entered.

BAYLEY, J. :

Upon these pleadings I am of opinion that the plaintiff is not entitled to recover. This declaration states that the defendant was retained to ascertain whether a sum of money was standing in the books of the Bank of England in the names of certain persons, and that he neglected diligently and sufficiently to search in the books of the Bank of England for that purpose, by reason of which the plaintiff sustained the loss in question. Now

all these facts existed above six years before the action was commenced. The defendant's promise, his negligence, the payment of the money by the plaintiff, in short, the whole cause of action *existed above six years ago. Mr. *Tindal's* argument is this, that as the plaintiff did not know the injury he had sustained, till within the six years, the cause of action had not accrued; but I think the cause of action accrued from the time the breach took place. If the want of knowledge could take the case out of the Statute of Limitations, it would be competent to the plaintiff to state this in his replication; and the same observation applies to the subsequent promise. The common cases of acknowledgment are entirely different. There the acknowledgment raises, by implication, the same promise as that stated in the declaration. But the declaration must be so framed as to agree with the acknowledgment, and, therefore, in an action by an executor, upon promises to the testator, in his life-time, it is not sufficient, in answer to a plea of the Statute of Limitations, to give in evidence an acknowledgment to the executor within six years. In this case, there is no promise stated in the declaration, to which this acknowledgment can apply. Upon these pleadings, therefore, I am of opinion, that a nonsuit must be entered.

SHORT
v.
M'CARTHY.

[*631]

HOLBOYD, J. :

The issue upon the record is, whether the cause of action stated in the declaration, accrued within six years; and, as I am of opinion, that the cause of action accrued from the time of the breach of duty by the defendant, and not from the time of its discovery by the plaintiff, it follows that a nonsuit must be entered. In the case of a subsequent promise, in order to take a debt out of the Statute of Limitations, the subsequent promise must agree with the original promise stated in the declaration; and, therefore, it has been frequently held, that a subsequent *acknowledgment to an executor, will not support a declaration, framed on promises to the testator, because the question upon the record is, whether the promise was made to the testator within six years. The question upon this record is, whether the neglect of the defendant took place within six years. The plea of the defendant has been proved, and the subsequent acknowledg-

[*632]

SHORT
v.
M'CARTHY.

ment, although it may, perhaps, give a new right of action upon a declaration specially framed for that purpose, does not establish the issue upon this record, and does not entitle the plaintiff to recover. This rule for entering a nonsuit must be absolute.†

Rule absolute.

1820.

[632]

DOE, DEMISE OF LE CHEVALIER *v.* HUTHWAITE
AND ANOTHER.†

(3 Barn. & Ald. 632—642, 8 Taunt. 306—314.)

Devise to S. D. for life, with remainder to the first son of S. D. in tail male, and in default of issue to his second son in tail male, and in default of his issue to the third, fourth, fifth, and sixth sons, in tail male, severally and successively, in remainder, one after another, in order and course as they respectively should be in seniority of age and priority of birth; the several and respective heirs male of all and every son, every elder of such sons and his heirs male being preferred to and to take before the younger; and in default of such issue, then to the first, second, third, fourth and all, &c. the daughters of S. D. and their issue, severally, successively, and in remainder, &c. as in the limitation to the sons, the elder being always preferred to and to take before the younger; and in default of any such issue, then to G. H. the eldest son of J. H. of Nottingham, for life, with limitations to his first and other sons and daughters similar to those to the children of S. D.; and in default of such issue, to S. H. second son of J. H. of Nottingham, for life, with precisely the same limitations to his first and other sons and daughters as in the preceding; and in default of such issue, to J. H. the third son of J. H. of Nottingham, for life; with remainder to his children, as in the preceding limitations. S. H. was in fact the third and J. H. the second son of J. H. of Nottingham: Held, by the Court of Common Pleas, that the intention appearing from the name must prevail over that by the description, and that S. H. became entitled upon the death of G. H. without issue. But, Held by the King's Bench, as a Court of Error: that evidence of the state of the testator's family, and other circumstances, was admissible to shew whether he had mistaken the name of the devisee or not; and, upon such evidence being given, that it became a question of fact for the jury, whether the mistake was in the name or in the description.

EJECTMENT, on the demise of S. F. Le Chevalier, and Keturah Mary, his wife. Plea, not guilty. The cause was tried before
[*633] Holroyd, J. at the Nottingham *Spring Assizes, 1817, when a verdict was found for the plaintiffs, subject to the opinion of the

† BEST, J. was absent from indisposition.

CAIRNS in *Charter v. Charter* (1874) L. R. 7 H. L. 364, 381.—R. C.

† See this case referred to by Lord

Court of Common Pleas on a special case, with liberty to either party to turn the same into a special verdict. The Court of Common Pleas gave judgment for the defendants. The case was then turned into a special verdict, and removed into this Court by writ of error. The special verdict stated the following facts : George Donston was seised of the tenements in question in fee, and on the 17th May, 1781, by his last will in writing, duly executed and attested for the passing of real estates, after bequeathing several legacies, and, amongst others, the sum of 1,000*l.* to all and every the children of John Huthwaite, of the town of Nottingham, mercer, to be equally divided amongst them, devised, subject to certain annuities mentioned in the will, all his real estates whatsoever, including the premises for which the action was brought, to certain trustees therein named, upon the following trusts ; to the use of Starkie Donston, son of Henry Donston, for life, with remainder to the first son of Starkie Donston, in tail male, and in default of such issue, to the second son of Starkie Donston, in tail male ; and in default of such issue, to the third, fourth, fifth, sixth, and all and every other son and sons of Starkie Donston, severally and successively in remainder, one after another, in order and course as they respectively should be in seniority of age and priority of birth, the several and respective heirs male of all and every such son and sons, every elder of such sons, and his heirs male being always preferred, and to take before the younger ; and in default of such issue, there were similar limitations to the first, second, third, fourth, and all other daughters of the said Starkie Donston, and *their issue severally, successively, and in remainder, one after another, in order and course as they should respectively be in seniority of age and priority of birth ; and among the several heirs, every elder of such daughters being always preferred, and to take before the younger ; and in default of such issue, to George Huthwaite, the eldest son of John Huthwaite, of Nottingham, mercer, for life, remainder to the first son of George Huthwaite in tail male ; and in default of such issue, to the second son of George Huthwaite in tail male, remainder to the third ; fourth, fifth, sixth, and all and every other son and sons of George Huthwaite severally and successively in remainder, one

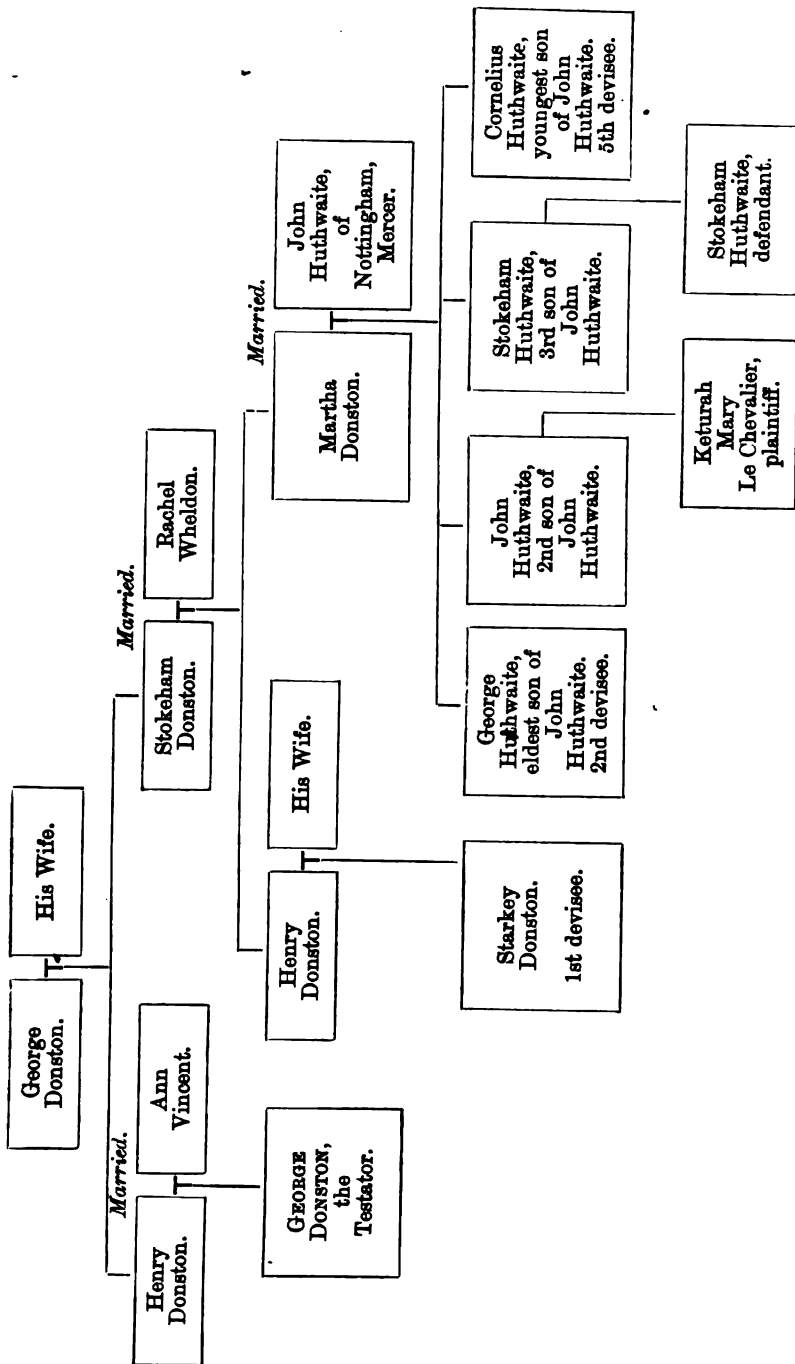
DOE
v.
HUTHWAITE.

[*634]

DOE after another in order and course as they should respectively be
 v.
 HUTHWAITE. in seniority of age and priority of birth, and the several and
 respective heirs male of such son and sons, every elder of such
 sons, and the heirs male of his body, being always preferred, and
 to take before the younger of them, and the heirs male of his
 body: then there were the same limitations to the first, second,
 and other daughters of George Huthwaite as to those of Starkie
 Donston; and then, in default of such issue, to Stokeham Huth-
 waite, second son of John Huthwaite, for life, with remainder to
 his first and other sons and daughters, in the same terms as in
 the preceding limitations; and in default of his issue, to John
 Huthwaite, the third son of the above-mentioned John Huth-
 waite, for life, with remainder to his first and other sons and
 daughters in strict settlement as in the preceding limitations;
 and in default of such issue, to Cornelius Huthwaite, the youngest
 of the sons of the said John Huthwaite, for life, with remainder
 to his children in strict settlement; and in default of his issue, to
 [*635] R. Dalzel for life, with remainder *to his children in strict settle-
 ment; † and in default of his issue, to George Nevil, with re-
 [*636] mainder to *his children, also in strict settlement; and in
 default of his issue, to Christopher Nevil, with remainder to his
 children in strict settlement; and in default of his issue, to
 Edward Nevil for life, with remainder to his children in strict
 settlement; and in default of his issue, to the testator's right
 heirs for ever. At the date of the will Starkie Donston was the
 nearest relation to the testator on the side of his father, and the
 sons of John Huthwaite, of the town of Nottingham, mercer,
 were his next nearest relations. The testator died in 1784,
 seised of the premises in question, without revoking his will.
 Starkie Donston died without issue in the lifetime of the testator.
 Upon the death of the testator George Huthwaite, the eldest son
 of John Huthwaite, of Nottingham, entered upon the premises
 under the will, and died without issue of his body in March, 1817.
 John Huthwaite was the second son of John Huthwaite, of Not-
 tingham, and he died in March, 1788, leaving issue Keturah Mary,
 the wife of S. H. Le Chevalier, and Stokeham Huthwaite was the
 third son of John Huthwaite, of Nottingham, and he died, leaving

† See pedigree on opposite page.

DOE
v.
HUTHWAITE.
[635, n.]



DOE v. HUTHWAITE. issue Stokeham Huthwaite, one of the defendants, his eldest son. Mary le Chevalier was the heir-at-law of George Donston the testator. It then stated the demise by the lessor of the plaintiff, and an ouster by the defendant.

The following was the judgment delivered in the Court of Common Pleas, by

1818. GIBBS, Ch. J. :

[8 Taunt. 313] This case arose out of a devise to Stokeham Huthwaite, considered with reference to another devise to John Huthwaite, under the will of George Donston. (Here his Lordship recapitulated the facts of the special case, which was substantially the same as the special verdict above set forth.) It is unnecessary to advert particularly to the respective claims of the parties, as the only question for the consideration of the Court turns on the two devises to Stokeham and John Huthwaite. It is clear, that both Stokeham and John Huthwaite were intended to take as devisees under the will, and the only question is as to their priority. Stokeham Huthwaite is rightly named in the will, but erroneously described as being the second son, that description being applicable to John Huthwaite. It is a well-known maxim of law, that *Veritas nominis tollit errorem demonstrationis*. To apply this maxim, however, it must be clear, that the devisor meant the person named ; for if it be proved, that, by mistake, the party was wrongly named, the description will prevail over the name. In *Smith v. Coney*,† *the description prevailed against the name, because the Court thought the testatrix meant the person to whom the description, and not the name applied. Here there is nothing to shew that Stokeham Huthwaite was not the person intended to take, though the testator gave him the erroneous description of second son ; he might have known both Stokeham and John personally, and yet have mistaken the order of their seniority. All the other limitations in the will are according to seniority, but we cannot be certain that the testator intended this principle to apply with regard to Stokeham and John Huthwaite, or that he did not mention Stokeham before John, from personal considerations. It has been contended, that

[*8 Taunt.
314]

† 6 Ves. 42.

if John is not to take under the true description, both these devises are void. If the description were such as to convince the Court that the person named could not be the person intended, or if it were doubtful, then such consequence might follow; but, in the present case, we think that the error in describing Stokeham as the second son, does not shew that he was not intended to take in the order in which he is named in the will. We are, therefore, of opinion, that Stokeham Huthwaite is entitled.

DOE
v.
HUTHWAITE.

Shadwell, for the lessor of the plaintiff :

[3 B. & Ald.
636]

Under this devise John Huthwaite, the second son, takes the estate before Stokeham Huthwaite. The devise is to Stokeham Huthwaite by name, but by description to John Huthwaite, who is the second son. The name and the description are wholly inconsistent with each other; and the question is, what the intention of the testator was. *That intention is to be collected from the whole of the will, and it is evident that in the disposition of his property he had regard to priority of right as founded on priority of birth; his intent was that his estate should go in the same order as it would have gone if he had died intestate. Six different devisees are designated by name in the will; to each of these he gives an estate for life, with remainders in strict settlement, their children in every case being preferred according to priority of birth. To adopt the construction contended for on the other side would be inconsistent with every other restriction and regulation contained in the will, and contrary, therefore, to the general intention of the testator. It will be contended in this case, that the name must prevail over the description; but the application of names, and the situation in which the parties stand, are circumstances only by which it is to be collected who was the individual intended to take under the will. The name, indeed, is one material circumstance; but there may be others in the disposition of the property, which are sufficiently strong to shew that there is a mistake in the name, and that the intention was that another person should take. From the whole of this will it is evident, that the intention of the testator was, that in every case the second son should take before the third. There is a

[*637]

DOE mistake either in the name or in the description. It is impossible
 HUTHWAITE. that the testator should have been mistaken with respect to the
 order of succession, and he may have been mistaken with respect to
 the names of the parties. Putting it, therefore, on the ground of
 probability, the safer course would be that the devisee should take
 according to the order of succession. There are many cases to
 [*638] be found in the books, both *with respect to deeds and wills,
 where the names of the grantees or devisees have been mistaken,
 and the Courts have collected the intention from the whole of the
 instrument, and corrected the mistake. In Co. Litt. 3 a, it is
 said, "A wife is a good name of purchase without a christian
 name, and so it is if a christian name be added and mistaken, as
 Em for Emelyn, &c. for *utile per inutile non vitiatur*." Here the
 party is sufficiently described as a second son, and the name may
 be rejected as useless. In the same passage Lord Coke says, "If
 lands be given to Robert Earl of Pembroke, where his name is
 Henry; to George Bishop of Norwich, where his name is John;
 and so of an abbot; for in these and the like cases there can be
 but one of that dignity or name; and, therefore, such a grant is
 good, albeit the name of baptism be mistaken." In 3 Leon. p. 18,
 case 44, there is this case, "Lands were given to the mayor,
 chamberlain of the hospital of Saint Bartholomew, London,
 whereas they were incorporated by another name; yet the devise
 is good by Weston and Dyer, which Manwood also granted,
 because it shall be taken according to the intent of the devisor;
 and it was said by Weston, 'If lands be devised to A., eldest son
 of B., although that his name be W., yet the devise to him is
 good, because there is sufficient certainty.'" In *Pitcairne v.*
Brase,† the devise was to William Pitcairne, the eldest son of
 Charles Pitcairne, of Twickenham; the name of the eldest son
 was Andrew, and this was held to be a good devise to him, so
 that the description was preferred to the name; and it is there
 said, "that the rule is the same in the civil law; as, for instance,
 [*639] where the testator devised *lands or tenements by a wrong name,
 if this mistake appears otherwise by circumstance, so that the
 will of the testator may be sufficiently known, the legacy shall
 have its effect, though the true name is mistaken. Dom. 1,
 vol. 54." In *Thomas v. Thomas*‡ the devise was to my grand-

† Finch's Reports, 403.

‡ 3 R. R. 306 (6 T. R. 671).

daughter, Mary Thomas, of Llechlloyd, in Merthyr parish; and at the time of the testator's death, he had a granddaughter of the name of Elinor Evans, who lived at Llechlloyd, in Merthyr parish, and a great granddaughter, Mary Thomas, who lived elsewhere, some miles from Merthyr parish; the devise was held void for uncertainty. In that case, although the devisee was designated by name; yet, inasmuch as the description was inconsistent with the name, it was held to make the devise void. The name, therefore, is rejected, when the Court clearly see, from other circumstances, what the intention of the testator was. In *Smith v. Coney*,† the will gave a legacy to the Reverend Charles Smith, of Stapleford Tawney, in the county of Essex; there was a person of the name of Richard Smith, answering the description in the will, and there was an officer in the army of the name of Charles Smith, known to the testatrix. It was held, however, that the Reverend Richard Smith was entitled to the legacy. The description was there preferred to the name. These cases shew, that the name is only one circumstance by which a party may be designated; and if it appear, from other circumstances, that another person was intended, the Court will construe the will according to the general intention of the testator. Here, it does sufficiently appear, from the whole of the will taken together, that the testator intended *that John Huthwaite should take the estate before the third son. If, however, the devise is void for uncertainty, the lessor of the plaintiff is entitled to recover as heir-at-law.

DOE
v.
HUTHWAITE.

[*640]

Denman, contra :

John Huthwaite cannot take under a devise to Stokeham Huthwaite, although the latter be improperly described as the second son. The maxim of law applies in this case,† *veritas nominis tollet errorem demonstrationis*, for the devisee is here rightly designated, both by his christian and surname. If there had been no devise subsequent to that to Stokeham Huthwaite, the case would not have admitted of argument. The argument on the other side, assumes that the testator could have no reason for preferring the third to the second son, but nothing appears to

† 6 Ves. 42.

† Lord Bacon's Maxims.

DOE
v.
HUTHWAITE.

[*641]

shew, that the third son may not have been the object of selection from motives of personal affection ; and the mistake may, therefore, as well be in the description as in the name. In Dyer, 119 a, pl. 7, it is said, if an obligation made to J. S. son and heir of G. S. when, in truth, he is a bastard, or as the book 9 Ed. IV. 29 b, is, a woman was bound by the name of Alice S. wife of J. S. and in truth she was a widow ; or *contrà*, if she be called widow while she is a *feme covert*, these words are only nugatory. In *Lord Evers v. Strickland*,† a conveyance was made to Rodolph Evers, Knight, Lord Evers ; at that time he was not a knight, or known as such ; it was held, however, that he might take under the deed, and it is there said, that the addition of knight, though false, should not take away the description of the true *person to whom the conveyance was made, but that he ought to have the same, being sufficiently expressed by the name of Lord Evers. These are cases, therefore, where the name has prevailed over the description. The devise, in this case, is to Stokeham Huthwaite by name ; there was a person of such a name, and only one ; the devise, therefore, cannot apply to any other person who is not of that name. The cases cited on the other side do not apply, for in all of them it was perfectly clear, from other circumstances, that the testator had mistaken the name. In this case that is by no means clear. In *Thomas v. Thomas*, the devise was to the testator's granddaughter, Mary Thomas, living in Merthyr parish ; Mary Thomas did not live in Merthyr parish, and was only his great granddaughter, and there was a granddaughter who actually did live in that parish. In that case, therefore, the Court held the devise void for uncertainty. In this case it is contended, that the mistake in the name shall be a ground for setting aside Stokeham H. altogether, and introducing John H. In *Pitcairne v. Brase* it does not appear that there was any person of the name of Charles Pitcairne, the son of William Pitcairne. The same observation applies to the case in Leonard ; there was no other corporation that answered the description mentioned in the will. Secondly, if this devise be void for uncertainty, the lessor will not be entitled to the property as heir-at-law, but Cornelius, the youngest son, will take.

† Bulst. 21.

Shadwell, in reply :

DOM

v.

HUTHWAITE.

The cases cited on the other side, are distinguishable from this, on the ground that here there is another person who answers the description of second son, which in the will, is applied to Stokeham *Huthwaite. In those cases, there was no other person answering the description. There was but one Lord Evers, and it does not appear, from the cases put in Dyer, that there was any person answering the description of son and heir of J. S. or the wife of J. S. Here there is a person who corresponds completely with the description, and that description ought to be preferred to the name, because effect will thereby be given to the general intention of the testator. The same observation applies to the maxim *veritas nominis tollet errorem demonstrationis*, it assumes that there is an error in the description ; here, on the contrary, the error is not in the description, but in the name.

[*642]

Cur. adv. vult.

In the course of Michaelmas Term the LORD CHIEF JUSTICE stated that the Court had considered the case ; and were of opinion that evidence of the state of the testator's family, and other circumstances, was admissible, and that upon such evidence being given, the jury might find whether he had made a mistake in the name of the devisee or not. If no such evidence were given at the trial, it would then be a mere question of law as to the intention of the testator, to be collected only from the will itself ; upon which the Judge must direct the jury, and it would be open to either party to tender a bill of exceptions. The Court, therefore, thought that there should be a *venire de novo*.

Venire de novo awarded.

1820.
June 6.

[645]

ANDREWS, CLERK, *v.* DIXON, ESQ., SHERIFF OF
WORCESTERSHIRE.

(3 Barn. & Ald. 645—646.)

Where a sheriff, with knowledge that there is rent due to the landlord, proceeds to sell the tenant's goods by virtue of a writ of *fi. fa.* without retaining a year's rent, he will be liable for it, although no specific notice has been given to him by the landlord.

[*646] *JERVIS* moved for a new trial in this case, which was tried at the Guildhall sittings after last Easter Term, before Abbott, Ch. J. The action was brought by the plaintiff, who was the landlord of certain premises, against the sheriff, for taking and selling the goods of the tenant under a writ of *fi. facias*, without retaining a year's rent, pursuant to the statute 8 Anne, c. 14. It *appeared that the goods had been removed and sold under the execution between the 5th and 10th January, and that no notice was given till the 17th January, on the part of the landlord, of any rent being in arrear. But it appeared in evidence that the sale had been conducted with great secrecy and dispatch; and the learned Judge left it to the jury to say whether the sheriff knew of the fact that rent was in arrear, although no notice of it had been given to him before the sale. The jury found a verdict for the plaintiff; and the question was, whether the notice, after the sale, given to the sheriff was sufficient. He cited *Armitt v. Garrett, ante*, p. 453, where the notice was given before the sale. Here it was not given till after that period.

Per CURIAM :

No specific notice is required by the statute. If, indeed, a sheriff has no reason to suppose any rent to be due, he will be protected in case he pays over the money to the execution creditor. Here, however, the extraordinary haste and secrecy of the sale shew that he did know of and expected a claim from the landlord. If after that he chooses to proceed, he is liable. The notice to the sheriff is only for the purpose of establishing beyond doubt his knowledge of the landlord's claim. If that knowledge can by any other means be brought home to him at any time before he has parted with the money, he will be liable.

Rule refused.

THE KING *v.* PARKYNS AND OTHERS.

(3 Barn. & Ald. 668—679.)

1820.
June 8.

[668]

On the charter day for the election of Lord Mayor of the city of London, the business of the election ought to have precedence of all other matters ; and therefore it is not lawful, after the Lord Mayor and aldermen have retired from the hustings, to propose any other business inconsistent with the election, the discussion of which may have the effect of putting it off altogether.

THE *Solicitor-General*, in last Michaelmas Term, had obtained a rule *nisi* for a criminal information against the defendants, for having, on the last charter day (29th September, 1819) for the election of the Lord Mayor of the city of London, obstructed that election in a violent and tumultuous manner. The custom, as to the election of Lord Mayor, as stated by the affidavits, was as follows : The livery of the different companies within the city, are summoned every year to attend at Guildhall, on the 29th day of September, or on the day preceding, in case the 29th of September shall happen to fall on a Sunday, for the election of a Lord Mayor for the year ensuing, by precepts issued previously for that purpose by the Lord Mayor, by an order of a court of aldermen, and directed to the master and wardens of the several livery companies of the city of London. On the morning of the election day in every year, the Lord Mayor, Recorder, and aldermen, with the sheriffs and other officers of the city, after having met together in the council chamber at Guildhall, and proceeded from thence to church, return again to Guildhall, for the purpose of the election ; immediately upon their return, the Lord Mayor, Recorder, *aldermen, sheriffs, and other city officers, being seated in their respective situations, on the place where the court of hustings is usually held, the town clerk dictates to the common crier a proclamation to the following effect, that is to say : “ You good men of the livery, of the several companies of this city, summoned to appear here this day, for the election of a fit and able person to be Lord Mayor of this city, for the year ensuing, draw near, and give your attendance. God save the King.” Which proclamation the common crier makes. The Recorder then advances towards the front of the hustings, and informs the persons of the livery who are

[*669]

THE KING
v.
PARKYNS.

assembled, that they, of old custom, know the cause of their assembly and meeting together is for the purpose of returning two fit and able persons to the Lord Mayor and aldermen, for one of them to be chosen Lord Mayor for the year ensuing. The course then is, that the present Lord Mayor, Recorder, and aldermen, retire to an inner chamber, and there remain, with the doors closed, until the election be brought to them, leaving the Common Serjeant, the sheriffs, the town clerk, and other city officers, in the place where the court of hustings is usually holden to carry on the election. The Common Serjeant then states, shortly to the livery, to the effect of what the Recorder has before said, and to put them in mind of the order they are to use in their election; that is to say, that he, the Common Serjeant, will have to read over to them the names of those aldermen who have served the office of sheriff, and have not served the office of Lord Mayor; after which, the said names will be put to them, separately, by the common crier, and then, and not until then, they will be required to hold up their hands, for shewing *upon which two of the said aldermen their election might fall, and which two persons are to be returned to the Lord Mayor and aldermen, for their choice of one of the said two persons to be Lord Mayor for the year ensuing. The election then proceeds, and it is the practice to exhibit the names of the several aldermen on a board, as they are respectively named for such election, in order that the same may be the more distinctly known to the livery assembled in the hall. When the two persons have been so nominated, the Common Serjeant, with the sheriffs, chamberlain, town clerk, and other city officers, go to the Lord Mayor and aldermen, and there present the names of those two whom the commons have nominated, in their election, of whom the Lord Mayor and aldermen, by scrutiny, elect one, and afterwards come back to the place where the court of hustings is usually holden, when the Recorder states to the livery the name of the one whom they have elected, after which, proclamation is made of the alderman so elected to come forth, and declare his consent to take upon himself the office; and if he is then present, and consents thereto, he is invested with the chain of office by the sword bearer, and the election is completed. On Michaelmas

[*670]

Day last, the livery assembled, and after the Lord Mayor, Recorder, and aldermen had taken their seats on the hustings, and as soon as the common crier had opened the hall, a considerable noise and tumult took place, during which time the Recorder addressed the livery; and the Lord Mayor, Recorder, and aldermen then retired to the common council room. Upon the Common Serjeant's coming forward with the sheriffs, in order to proceed with the election, there was a great press on the hustings, in the course of *which the defendants came forward, and (the Common Serjeant having in consequence retired) addressed the livery, and proposed and carried some resolutions relative to the transactions at Manchester, on the 16th of August, 1819. After these resolutions had been carried, in the course of which great noise and tumult took place, the election was allowed to proceed, and did proceed in the accustomed mode. The affidavits contained charges of previous arrangements, for the purpose of carrying on, and violent personal conduct in the course of these proceedings on the part of the several defendants. These latter circumstances were all expressly denied by the defendants; but they admitted that they had come forward to address the livery, and to propose the resolutions, contending that they had a right so to do. As to this point, their affidavits stated that it was their belief, and that of the general body of the livery, founded on an opinion formerly given by Serjt. *Glynn*, then Recorder of London, that it was their inherent and undoubted right, when legally assembled in common hall on the 29th September, or on any other day, to discuss public grievances; and that several requisitions respectably signed, having been delivered to John Atkins, Esq. the Lord Mayor, to call a common hall for the purpose of discussing public measures, which had been all refused, contrary to the usual practice, great dissatisfaction had arisen; that on the day in question, upon the Recorder coming forward to the common hall there was a general cry of "No election, grievances first;" and that after the Lord Mayor and aldermen had retired, the resolutions were proposed, put, and carried. They further stated, that there was no intention of preventing the election, and adduced several instances in which *similar resolutions had

THE KING
v.
PARKYNS.

[*671]

[*672]

THE KING on former occasions been proposed and carried. These were ten
PARKYNS. in number; the earliest being on Midsummer Day, 1769. In five of the instances resolutions unconnected with the election had been passed previously to it, and on the remaining five the resolutions appeared to have been passed subsequently to the election.

[After argument:]

[674] **ABBOTT, Ch. J.:**

I am of opinion, considering the peculiar nature of this assembly, and the purpose for which it was met, that it was not competent to them to go into any other matter previously to the election. The course is this, the whole body corporate are to meet together after divine service, and being met, the Recorder addresses the livery, and propounds to them the object for which they are called together, and that being done, the Lord Mayor and aldermen retire into a separate chamber, in order that the meeting may proceed to the election of two persons, who are to be presented to the court of aldermen for their choice of one to the office. Now, if *antecedently to the election by the livery, and in the absence of the Lord Mayor and aldermen, it were to be permitted to propose any one matter as a subject for discussion, no person can say why other matters might not equally be submitted to their consideration, in which case the election might be deferred or altogether prevented. It does, therefore, appear to me, that where a part of the corporation are left by themselves for the exercise of a particular duty, the going into any other matter is inconsistent with the purpose and object for which the body corporate are then met. Much has been said in argument respecting this being the ancient custom and usage of London. The earliest instance of the exercise of such a power was in the year 1769, a date much too recent to be a foundation for an ancient custom. As to the instances between that period and the present, half of them were discussions antecedent, and half subsequent to the election; and I think that they are by no means sufficient to establish, by way of custom, a right to do a thing inconsistent with the object for which the livery were then

[*675]

left together, and which may have the effect of preventing the election altogether. I forbear to say any thing on the general question. My opinion is confined to the claim of right on the part of the livery, at this particular time when the Lord Mayor and aldermen have withdrawn, to enter into any other matter unconnected with the election. It does not appear to me that that is established by the affidavits laid before us, or the instances to which those affidavits refer. But although we may think that the defendants had no legal right to insist upon this claim, yet as they might have reasonable ground for supposing *that they had the right, it does appear to me that this rule ought to be discharged.

THE KING
v.
PARKYNS.

[*676]

BAYLEY, J. :

I am of the same opinion. It is a general rule in corporation law, that the election of the head officer must take place on a given day. Now, on the charter day the members of the corporation have a right to expect that the election will take place, and that no other business will be interposed until that has been completed. If one subject of discussion may be interposed, many may, and so the day may ultimately be exhausted, and the election defeated. It has been said that if this right be not allowed, other rights possessed by the common hall may be entirely obstructed by its dissolution by the Lord Mayor. If, however, the Lord Mayor were to dissolve a common hall with a criminal intent and for criminal purposes, he might be liable to be punished for so doing. But that does not apply to the present question. On the charter day it is quite clear that the election is the business with which the common hall ought to begin. Before, however, the Court will grant a criminal information against the defendants, they must be satisfied that they acted from criminal, and not merely from mistaken motives. Here, however, the parties swear that they believed they had the right which they claimed. They have produced several instances in which business unconnected with the election has had precedence on the charter day. They might be misled by these instances. I think, therefore, that the rule ought to be discharged.

THE KING HOLROYD, J. :

ϕ.
PARKYNS.

[*677]

In this case, the whole of the corporate body were assembled for a special and important purpose, *viz. to choose the head of the corporation. Now, when they are so met, it seems but reasonable that that special purpose should have precedence, unless by the general assent of the whole body it be otherwise arranged. I think that without the assent of the presiding officer, they had no right to go into other business previously to the election; and my opinion is confirmed by *Machell v. Nevinson*,† where the Court held that the corporation must proceed in the business for which they were specially convened, in preference to any other, unless by the consent of the whole corporate body, or at least that of the presiding officer. Supposing, therefore, the business of the election not to have commenced previously to the interruption of it by the defendants, I think that interruption would not have been legal. But I am of opinion that the business of the election had commenced, for one part of the corporation had been separated from the rest, to perform the special function entrusted to them. And I think, therefore, that at that time they had no right to proceed on any other business, till that for which they had been so separated had been completed; that is the general rule of law, and I think that no particular custom in London to the contrary has been proved. The general rule of law seems to me to be recognised in the cases of *Oldknow v. Wainwright*,‡ and *Rex v. Mayor of Carlisle* ;§ in the latter case, which was a return to a mandamus, PRATT, Ch. J. stated this, “The powers of the common council, and the Mayor and aldermen, are distinct. The common council

[*678] can do no acts, unless assembled *in that capacity; neither can the Mayor and aldermen, unless they met only as such, upon a regular summons for that purpose: as they had distinct authorities, they must be summoned in their distinct capacities. Here was no summons to meet as Mayor and aldermen only, the consequence of which is, that the acts done by them in that distinct capacity are void.” Now, here the livery were not

† 2 Ld. Ray. 1355; S. C. 11
East, 84.

‡ 2 Burr. 1020.
§ 1 Str. 385.

THE KING
v.
PARKYNS.

assembled as a separate body, but they were separated from the rest of the corporation, in order to perform their part of the election, which was to be completed by the whole body; but a separation for that particular purpose does not give them a right to act as a separate body for any other purpose whatever, and unless there be, therefore, some special custom or charter which distinguishes this case from others, it seems to me that the reasoning of PRATT, Ch. J. applies to the present case, and that by law the livery could do no act when separated from the rest of the corporation. I think, therefore, that the right claimed by the present defendants does not exist. I entirely agree on the other point that this rule should be discharged.

BEST, J. :

I entirely concur with the rest of the Court on both the points. It seems that an opinion has prevailed in the city of London, that there exists a right on the charter days for the election of Lord Mayor and sheriffs, to bring on for the consideration of the livery other matters unconnected with those elections, and that idea has been confirmed by an opinion of Mr. Serjt. *Glynn*, their Recorder. Under these circumstances the rule ought not to be made absolute against the present defendants, who have acted under that misconception. *But I am clearly of opinion that the right contended for does not exist; no authority has been cited in support of it, but it is insisted that when this corporation is assembled for these particular purposes, that they have a right by custom to proceed to the discussion of other matter. I think no such custom has been proved to exist, and I think if it had been proved, it would have been a bad custom by law. It is admitted in argument that they have no right to engage in a discussion of such length as would altogether put off the election; but that admission seems to me to make an end of the case, for if persons are allowed to interpose any other matters, who can say when the discussion will cease. It seems to me, therefore, that it is not lawful to give any other business precedence of the election. But here the election had actually begun, and the Lord Mayor and aldermen were necessarily absent in the discharge of

[*679]

THE KING their duty. I think, therefore, that there is no foundation for
 v.
PARKYNE. the right claimed by the present defendants.

Rule discharged.

1820.
 June 12.

TEMPEST v. FITZGERALD.

(3 Barn. & Ald. 680—685.)

[680]

A. agreed to purchase a horse from B. for ready money, and to take him within a time agreed upon. About the expiration of that time, A. rode the horse, and gave directions as to its treatment, &c. but requested that it might remain in B.'s possession for a further time, at the expiration of which he promised to fetch it away and pay the price; to this B. assented. The horse died before A. paid the price or took it away: Held: that there was no acceptance of the horse within the meaning of the Statute of Frauds.

ASSUMPSIT for the price of a horse. Declaration contained counts for horses sold and delivered, bargained and sold, &c. Plea, general issue. At the trial before Park, J. at the last Assizes for the county of Lancaster, the following facts were proved: In August, 1817, the defendant, then on a visit at the plaintiff's house, agreed to purchase a horse from him at the price of forty-five guineas, and to fetch it away about the 22nd Sept. as he went to Doncaster races. The parties understood it to be a ready money bargain. The defendant said he wanted it for hunting, and the plaintiff proposed to put it in a course of physic during his absence. The defendant soon after quitted the plaintiff's house, and returned on the 20th Sept. He then ordered the horse to be taken out of the stable, he and his servant mounted, galloped, and leaped the horse, and after they had so done, his servant cleaned him, and the defendant himself gave directions that a roller should be taken off and a fresh one put on, and that a strap should be put upon his neck, which was consequently done; he then asked the plaintiff's son if he would keep it for another week, he said that he would do it to oblige him. The defendant then said, that he would call and pay for the horse when he returned from the Doncaster races, about the 26th or 27th Sept. He told plaintiff's groom that the horse ought to be galloped more, and that it was not then in a condition for hunting. The defendant returned on the 27th, with the intention to take it away, but the horse having died *on the 26th

[*681]

TEMPEST
c.
FITZGERALD.

Sept. he refused to pay the price. Upon these facts it was contended by the defendant's counsel, that there had been no acceptance of the horse by him, so as to take the case out of the Statute of Frauds. The learned Judge was of opinion, that if the acts done by the defendant on the 20th Sept. were to be considered as acts of ownership, that there was a sufficient acceptance; and he left it to the jury to say whether the riding of the horse on that day was by way of trial, or whether the defendant was then exercising an act of ownership; and whether the directions then given, were by way of advice or as owner. If they thought that he was then exercising acts of ownership, then they were to find for the plaintiff; if otherwise, for the defendant. The jury found a verdict for the plaintiff. A rule *nisi* having been obtained for a new trial in last Easter Term,

Scarlett and Holt now shewed cause :

The question was properly left to the jury, whether on the 20th Sept. the defendant had not exercised acts of ownership upon the horse. The jury have found that he had, and that being so, there was clearly an acceptance of the horse, within the meaning of the Statute of Frauds. In *Blenkinsop v. Clayton*,† a case similarly circumstanced, the Court of Common Pleas thought it a question for the jury to determine whether the act done by the purchaser, was an act of ownership or not. *Chaplin v. Rogers*,‡ is an authority to the same effect. The object of the Legislature in the Statute of Frauds, was that there should be some act done by the party beyond the mere contract, to make it binding. Here such acts have been *done by the vendee, with respect to the property purchased, and admitting them to be equivocal in their nature, still the jury have found by their verdict that they were acts of ownership; and that being so, there can be no doubt that there was an acceptance of the property by the defendant, within the meaning of the Statute of Frauds.

[*682]

Cross, Serjt. and Milner, contra :

The intent and meaning of the statute was, that there should

† 18 R. R. 602 (7 Taunt. 597; ‡ 6 R. R. 249 (1 East, 192).

1 Moore, 328).

TEMPEST be certain forms used in order to make a contract binding, or that
 v.
 FITZGERALD. there should be some clear unequivocal act done by the vendee,
 to shew that he had adopted the contract. In this case the acts
 relied upon were at least equivocal. This also was a ready
 money bargain, and the defendant could have no right to take
 away the horse until he paid the money. They were then
 stopped by the Court.

ABBOTT, Ch. J. :

The Statute of Frauds was made for wise and beneficial purposes, and ought to receive such a construction as will best accord with the plain and obvious meaning of the Legislature. By the 17th section† it is enacted, “that no contract for the sale of goods, wares, or merchandizes, for the price of 10*l.* or upwards, shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same ; or give something in earnest to bind the bargain, or in part of payment ; or that some note or memorandum in writing of the said bargain, be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.” Now in this case there was not any earnest given, or any part payment, or any note or memorandum in writing. The question, therefore, *is whether the buyer had accepted part of the goods sold and actually received the same. Now the word “accepted” imports not merely that there should be a delivery by the seller, but that each party should do something by which the bargain should be bound. I do not mean, however, to say, that if the buyer were to take away the goods without the assent of the seller, that would not be sufficient to bind him. In this case payment of the price was to be an act concurrent with the delivery of the horse ; at any rate there is nothing to shew that either party understood that the one was to precede the other. In the first instance, therefore, this was a mere contract between the parties. It is urged, however, that there was evidence for the jury to find that the defendant had exercised acts of ownership as to the horse, on the 20th Sept. It appears from the learned Judge’s report, that on that day he came to the plaintiff’s house ; that he and his servant then rode the horse, and that he gave some directions as

† Now replaced by s. 4 of the Sale of Goods Act, 1893.

to its future treatment, and it is urged that these acts might be considered acts of ownership. I am of opinion, however, that the defendant had no right of property in the horse until the price was paid ; he could not then exercise any right of ownership. If he had at that time rode away with the horse, the plaintiff might have maintained trover. The distinction between this case and that of *Blenkinsop v. Clayton* is, that there the contract was not for ready money, but the horse was to be delivered within an hour, and the defendant treated it as his own by offering it for sale ; here the express contract is for ready money, and the payment of the price is an act concurrent with the delivery of the horse. I think, *therefore, that the rule for a new trial must be made absolute.

TEMPEST
v.
FITZGERALD.

[*684]

BAYLEY, J. :

This was a ready money bargain, and the purchaser could have no right to take away the horse until he had paid the price. If the argument on the part of the plaintiff were to prevail, the defendant might have maintained an action for the horse without paying the price, which would be contrary to the express terms of the contract.

HOLROYD, J. :

The object of the Statute of Frauds was to remove all doubts as to the completion of the bargain, and it, therefore, requires some clear and unequivocal acts to be done in order to shew that the thing had ceased to be *in fieri*. Those acts are either that the buyer shall accept part of the goods sold, and receive the same, or give something in earnest or in part payment, or that the contract be reduced to writing. These are all acts that clearly and unequivocally shew that the bargain is executed. It is said that the riding of the horse by the defendant on the 20th September, and the directions then given, may be considered as acts of ownership, and were, therefore, evidence of an acceptance of the horse ; but at that time the defendant had no right to take away the horse. For admitting, for the sake of the argument, that the property had been changed, still there is no evidence to shew that Tempest had ever parted with the posses-

TEMPEST
v.
FITZGERALD. sion or control, and if he had not, he had at all events a lien for the price, and the defendant could not be justified in taking it away until the price were paid. In *Blenkinsop v. Clayton*, the horse was to be delivered absolutely within an hour, *and the purchaser had treated it as his own property by offering to sell it to another; here, on the other hand, the horse was not to be delivered till the price was paid.

[*685]

BEST, J. :

I think that to take the case out of the Statute of Frauds, there should be some act so clear and unequivocal, as to shew beyond all doubt that the purchaser had accepted the horse. There is here no act of that description. This was a ready money bargain, and the defendant would, therefore, acquire no property in the horse until he paid the price. The acts, therefore, done by him on the 20th September, could not be acts of ownership, for at that time he had acquired no right to exercise any act of ownership.

Rule absolute.

1820.
June 21.

[702]

LEWIS, GENT. v. CLEMENT.

(3 Barn. & Ald. 702—710.)

Declaration for a libel concerning the plaintiff in his profession as an attorney. The libel began, "Shameful conduct of an Attorney," and then proceeded to give an account of proceedings in a court of law, which contained matter injurious to the plaintiff's professional character. The defendant pleaded that the supposed libel contained a true account of the proceedings in the court of law : Held, after verdict for the defendant, that the plea was bad, inasmuch as the words "Shameful conduct of an Attorney" formed no part of the proceedings in the court of law, and that the plaintiff was therefore entitled to judgment.

Quære, Whether it be lawful to publish proceedings of a court of law containing matter defamatory of a person neither a party to the suit nor present at the time of the enquiry.†

DECLARATION by plaintiff, an attorney, stated that before the publishing of the libel he had been retained and employed by one Wm. Carter as his attorney, and that the defendant, intending to injure him, did compose, print, and publish, in a public newspaper called "The Observer," the following libel concerning the

† See now 51 & 52 Vict. c. 64, s. 3.

LEWIS
v.
CLEMENT.

plaintiff in his profession, and concerning his conduct in the proceedings on behalf of Wm. Carter: "Insolvent Debtors' Court—Shameful conduct of an attorney. *Eades and Wood v. Carter*—Wm. Carter, the insolvent, an elderly man, by trade a carpenter, who resided at Ramsgate, and possessed a house and garden, exceeding 500*l.* in value, was opposed in his discharge by Mr. Heath on the part of his creditors. The ground of Mr. Heath's opposition was that the insolvent had put his clients, the opposing creditors, to considerable expense in defending two *actions, brought by them for goods delivered and received, and for bringing a bill of error after the verdict had been given against him, which put them to a further expense; and also for wasting his effects, by giving a warrant of attorney, and mortgage of his house, to his solicitor, Mr. Lewis, of Ramsgate, and thereby defrauding the remainder of the creditors by such an undue preference." The libel then proceeded to give the substance of the speeches of counsel and the examination of the insolvent, which contained matter reflecting on the plaintiff's conduct as attorney, and concluded by stating, that the Judge, Mr. Serjeant RUNNINGTON, deprecated in strong language the conduct of plaintiff, and suggested to Mr. Heath that in such a flagrant case they ought to apply to the Court of King's Bench—upon the subject of Lewis's conduct. Plea, first, not guilty; second, that William Carter had been imprisoned and detained in custody for debts due to Eades and Wood; that William Carter appeared before the Insolvent Debtors' Court as an insolvent debtor seeking his discharge from imprisonment; and that upon that occasion G. H. Esq. as counsel for Eades and Wood, publicly in the Court opposed the discharge of Carter from imprisonment; then stating, as such counsel, publicly in and to the same Court, as follows: "It then set out his statement, as well as that of the opposite counsel, the insolvent's examination, and the observations of the Judge in the words of the libel, and concluded by stating that the Insolvent Debtors' Court was and still is a public court of justice of our lord the King, and that the libel in the declaration mentioned was and contained a faithful and true account of the several proceedings so had in *the same as aforesaid on the occasion aforesaid. Replication, that the

[*703]

[*704]

LEWIS
v.
CLEMENT.

defendant published the same of his own wrong. The cause was tried before Abbott, Ch. J. at the Summer Assizes, 1818, for the county of Kent, when the jury found a verdict for the defendant on the justification. *Marryat*, in Michaelmas Term, following obtained a rule *nisi* for entering judgment for the plaintiff, on the ground that the pleas were insufficient. First, because it is not lawful to publish what passes in a court of justice, if it be defamatory of another who is neither a party to the suit nor present at the enquiry; secondly, because the pleas do not purport to set out the very words used, but only the effect of them; and, thirdly, because they only go to that part of the libel which purports to contain the statement of what actually passed in the court, and do not justify the comment with which it was accompanied, viz. "Shameful conduct of an Attorney."

[After argument:]

[710]

ABBOTT, Ch. J. now delivered the judgment of the Court:

This was an action for a libel, which professed to contain a narrative of the proceedings of the Court of Insolvent Debtors, on the application of a person of the name of Carter, to be discharged from imprisonment. It begins, "Shameful conduct of an Attorney," and then proceeds with a detail of the speeches of counsel, the examination of the insolvent, and the observations of the Judge. The defendant pleaded that the supposed libel contained a correct account of what actually passed in the Court on the occasion alluded to. Issue was joined, and a verdict was found for the defendant. An application was made to the Court, by the plaintiff, that he might have judgment, notwithstanding the verdict, on the ground that the pleas were bad in point of law. The matter was argued before us at Serjeants' Inn, and we are all of opinion, that the pleas are insufficient. The question, whether a person may publish a correct narrative of proceedings in a court of justice, which contains matter defamatory of a third person, not a party to the suit, it is not necessary to decide, because, in this case, the narrator has not confined himself to what actually passed in Court, but has prefaced the statement with the words "Shameful conduct of an Attorney." He has,

therefore, taken upon himself to make that allegation concerning the plaintiff. We think, therefore, that the pleas are bad, and that there must be judgment for the plaintiff, notwithstanding the verdict.

LEWIS
v.
CLEMENT.

Judgment for the plaintiff.

CLEMENT v. LEWIS.

(3 Brod. & Bing. 297—300; 7 Moore, 200—211; 10 Price, 181—206.)

THE King's Bench appear to have further awarded a writ of enquiry to assess the damages, on which judgment was entered up for 500*l.* damages and certain costs. Their judgment was brought up by writ of error to the Exchequer Chamber, who affirmed the decision on the point considered in the above judgment of ABBOTT, Ch. J.; but on technical grounds which are now obsolete, held that a *venire de novo* ought to have been awarded, instead of a writ of enquiry, and remitted the case to the King's Bench accordingly.

GRUMBRELL v. ROPER.

(3 Barn. & Ald. 711—717.)

1820.

[711]

A lease by the warden and poor of an hospital, under the corporation seal, made before the expiration of a former lease, to a lessee, who then had only a part interest in the first lease, but to whom the entire interest was assigned within three years afterwards, is binding upon the succeeding warden and poor of the hospital.

THE VICE-CHANCELLOR sent the following case for the opinion of the Court :

By indenture of lease dated 27th October, 1796, made between the warden and poor of the hospital of the Holy Trinity in Croydon, in the county of Surrey, of the foundation of the most Reverend Father in God John Whitgift, some time Lord Archbishop of Canterbury, of the one part, and Samuel Shore and Joseph Price, surviving executors of Richard Sherbrooke, deceased, of the other part, in consideration of the surrender to be cancelled of a former lease of the premises after-mentioned, theretofore

GRUMBRELL granted to Shore and Price by the warden and poor, for a term
 v. of years not then fully expired, (being a term which, if not
 ROPER. surrendered, would have expired on 29th September, 1803); as
 also, in consideration of a competent fine to them paid by Shore
 and Price, the warden and poor demised, granted, and to farm
 let, to Shore and Price, certain land and premises in the inden-
 ture described, to hold to them, their executors and administrators,
 from Michaelmas then last for twenty-one years, at the yearly
 rent of 15*l*. At the time when the lease of 27th October, 1796,
 was granted, the term in the prior and then subsisting lease was
 vested in Shore, Price, and William Hood, as assignees of the
 term granted by such lease; and such assignment was made to
 them upon the trusts of the will of R. Sherbrooke, in consequence
 of the death of another executor, and Hood did not join in the
 surrender of the pre-existing lease. By indenture 15th May,
 [*712] 1798, between Shore, Price, and *Hood, of the one part, and
 Mary Wilkes of the other part, Shore, Price, and Hood assigned
 to Mary Wilkes (*inter alia*) all the same closes or parcels of land,
 to hold to her for the residue of the term, subject to the rents
 and covenants contained in the lease. By indenture dated
 21st June, 1800, between Mary Wilkes of the first part, Thomas
 Irvine of the second part, and John Wainewright of the third
 part, Mary Wilkes, for the considerations therein mentioned, (by
 virtue of a licence from the warden and poor of the hospital, and
 by the appointment of Irvine,) assigned the said lands and pre-
 mises to Wainewright, for the residue of the said term, and of all
 the terms to be obtained thereof upon trust: as to four undivided
 six parts thereof, in trust for Irvine; as to one other undivided
 sixth part thereof, in trust for one Miriam Garrard, widow, her
 executors, &c.; and as to the remaining one undivided sixth part
 thereof, in trust for the executors or administrators of Joseph
 Kaye. On 31st January, 1801, Kaye's interest was duly assigned
 to Irvine; and in February, 1805, Mrs. Garrard's interest was
 also assigned to him, and Wainewright then conveyed the legal
 estate to him. By indenture 23rd February, 1804, made between
 the warden and poor, by their corporate description, of the one
 part, and Irvine of the other part, in consideration of the surren-
 der of a former lease of the said lands and hereditaments

theretofore granted by the warden and poor to Shore and Price, as surviving executors of Richard Sherbrooke, and by them assigned to Irvine for a term of years not then expired, to be cancelled; as also, in consideration of a competent fine paid by Irvine, the warden and poor leased to Irvine, his executors, &c. all the said lands and premises, which are described to be, and actually *were, at that time in the occupation and possession of Irvine, or his undertenants, to hold to Irvine from Michaelmas then last for twenty-one years, at the yearly rent of 15*l*. The hospital of the Holy Trinity in Croydon is a corporation, and was founded by Archbishop Whitgift, by the name and description specified in the first-mentioned indenture of lease, in virtue of letters patent from Queen Elizabeth, dated 2nd November, in the 38th year of her reign, empowering him so to do; or under and in virtue of the statute 39 Eliz. c. 5, which passed before the actual creation or foundation of the hospital. The two leases are under the hospital's common seal, and 15*l*. per annum is the accustomed rent reserved for the said premises ever since the same belonged to the corporation, and has been regularly paid by the successive lessees thereof to the present time. The question for the opinion of the Court was, whether the lease to Thomas Irvine bearing date the 23rd February, 1804, would bind the succeeding warden and poor of the hospital? The case was argued at the sittings at Serjeants' Inn, before last Michaelmas Term, by

GRUMBELL
v.
ROPER.

[*713]

Preston, for the plaintiff:

This is a lease from an hospital while a former lease was in being, and it is therefore void within 13 Eliz. c. 10, and 18 Eliz. c. 11, unless the old lease be to be expired, surrendered, or ended, within three years next after the making of the new lease. The 18 Eliz. c. 11, after reciting 13 Eliz. c. 10, which expressly mentions leases to be made by the master or guardian of any hospital, enacts, "Sithence the making of which said statute divers of the ecclesiastical and spiritual persons and others, having spiritual and ecclesiastical livings, have from time to time made leases for the term of twenty-one *years or three lives, long before the expiration of the former term of years, contrary to the true meaning and intent of the said statute; be it therefore

[*714]

GRUMBRELL
v.
ROPER. enacted, that all leases hereafter to be made by any of the said spiritual, ecclesiastical, or collegiate persons, or others, of any of their said ecclesiastical, spiritual, or collegiate lands, tenements, or hereditaments, whereof any former lease for years is in being, and not to be expired, surrendered, or ended, within three years next after the making of any such new lease, shall be void." The lease of 1796 was to expire in 1817, and the other lease was to commence before that period; it was therefore void, within the meaning of this statute, unless the former lease was surrendered within three years. There never was any surrender in fact, and the question is, whether there was any surrender by operation of law. The interest, in both cases, ultimately vested in Irvine. The assignment of the first lease to Irvine within three years cannot, however, amount to a surrender; for a surrender is a yielding up of an estate by the lessee to the lessor: any other determination must have been by merger. The union, however, of the two terms in the same person, could not operate as a surrender of the interest which existed in the former lease; because there was not, in this instance, any yielding up by the lessee to the reversioner. To bring the case within these Acts, there should have been a surrender to the hospital. A concurrence between different tenants to destroy a prior lease, was never contemplated by the Legislature. The assignment by Wainewright to Irvine of the whole legal interest, in the first lease, could not operate as a merger; because the lease of 1804, being a concurrent lease, conveyed only an *interesse termini*, *to commence when the former lease should be ended, and not an actual estate, or an immediate and present term of the reversion. The Legislature contemplated a surrender in fact, and not a surrender in law by the operation of merger. It requires an act proceeding from the first lessee to the owner of the reversion, and will not be satisfied with an act arising from the union of two estates by the acts of the second lessee. A concurrent lease can only be surrendered by operation of law, and not by a surrender in fact. Co. Litt. 388 a. Bacon's Abridgment, tit. Leases, Rule 3, p. 63, and *Wilson v. Sewell*† are authorities to shew that there cannot be any merger; because there is not any rever-

[*715]

† 1 Black. 617.

sion, but merely an *interesse termini*. A concurrent lease is not a lease *in esse*; it operates only by estoppel, and passes no interest whatever during the term granted by the former lease: it does not operate as the grant of a reversion, but as a reversionary lease, in the nature of an *interesse termini*. If there be no existing estate, there cannot be any merger; for both estates must be vested, in order that a merger may take place. There may be a release of an *interesse termini* by express words, or a surrender of it by operation of law; but the second lease not having conveyed an immediate vested interest, no second estate existed; and if so, there was not any estate to merge. Besides, Lord Coke lays it down that one term for years cannot merge in another.

GRUMBELL
v.
ROPER.

Marryat, contra :

This is not a lease within the restraining statutes. The 13 Eliz. c. 10, extends to leases by the master or guardian of any hospital; and the 14 Eliz. c. 14, declares that the words "master or *guardian of any hospital," mentioned in the former Act, meant all hospitals, maison dieu, bead-houses, and other houses ordained for the relief or sustentation of the poor. The 18 Eliz. c. 11, relates only to leases of ecclesiastical, spiritual, or collegiate lands, and not to hospital lands. The 39 Eliz. c. 5, authorises the establishment of corporate hospitals, and expressly enacts, that all leases to be made by any such corporation so founded, exceeding the term of twenty-one years, shall be void. Now, if a lease granted by such an hospital was within the restraining statute, this provision would be wholly useless. Besides, this lease is not by the master or warden, but by the corporation, under the corporate seal. This is therefore a valid lease, within 39 Eliz. c. 5, and is not affected by the statutes of 13 Eliz. c. 10 and 18 Eliz. c. 11. Besides, the acceptance of the new lease in 1804 operated to determine the lease in possession; for when the two terms became united in the same person, the former became merged in the latter. At any rate, there is not any authority for saying that an actual lease in possession is not an object of surrender, and that the union of the two terms in one person does not operate as a surrender by operation of law.

[*716]

GRUMBRELL *Preston*, in reply :

^{c.}
ROPER.

The 39 Eliz. c. 5, merely enabled individuals to convey mortmain for the erection of hospitals. It only took off the restrictions on alienation in mortmain. Under that statute, the lease must be a lease in possession. The 14 Eliz. c. 14, contains a declaration extending to all descriptions of hospitals, and therefore they must extend to all hospitals, whether erected before or after the Act. It is an established rule of law, that an *interesse termini* cannot merge in a term for years.

[717] “ This case has been argued before us by counsel, and we are of opinion that the lease to Thomas Irvine, bearing date February 24th, 1804, will bind the succeeding warden and poor of the said hospital.

“ C. ABBOTT.

“ J. BAYLEY.

“ G. S. HOLROYD.

“ W. D. BEST.”

THE KING *v.* SIR FRANCIS BURDETT, BART.†

(3 Barn. & Ald. 717—747, 4 B. & Ald. 95—184; S. C. 1 St. Tr. N. S. 1.)

1820.

[717]

On an information for writing, composing, and publishing a libel in the county of L., it appeared that the defendant, on the 22nd August, wrote and composed the libel in L., and that he was seen in L. on that and the following day. On the 24th, the libel was delivered in the county of M. (100 miles off) by A. to B., being inclosed in an envelope addressed to A., containing written directions to A. to forward the libel to B., by whom it was subsequently published in M. The envelope was open; and it was not proved that there was on it any trace of a seal or post-mark. A. was not called at the trial as a witness by either party; nor was it proved that he was a resident, or had been about that time in L.: Held, by three Justices, (*dissentiente* BAYLEY, J.) that this was evidence on which the jury might properly be left to presume that the libel was delivered open to A. in L.

Held, also, by three Justices, (BAYLEY, J. *dubitante*.) that a delivery at the post-office in L. of a sealed letter, inclosing a libel, is a publication of the libel in L. Held, also, by three Justices, (BAYLEY, J. *dubitante*.) where a defendant writes and composes a libel in L. with the intent to publish, and afterwards publishes it in M., that he may be indicted for a misdemeanour in either county.

And, *per totam* CURLIAM, where a libel imputes to others the commission of a triable crime: Held, that evidence of the truth of it is inadmissible.† Held, also, where, in summing up, the Judge told the jury that the intention was to be collected from the paper itself, unless explained by the mode of publication or other circumstances; and that, if its contents were likely to excite sedition, &c., defendant must be presumed to intend that which his act was likely to produce; and that, if they found such to be the intent, he was of opinion it was a libel; and that they were to take the law from him, unless they were satisfied that he was wrong: that this was a correct mode of leaving the question to the jury under 32 Geo. III. c. 60, s. 1.

Quære, whether the writing and composing of a libel with intent to publish, but not followed by publication, be an offence.

THIS was an information, filed by his Majesty's *Attorney-General*, against the defendant. The first count charged that the defendant, being an ill-disposed person, and intending to excite hatred and contempt of his Majesty's Government, and particularly among the soldiers of the King, and wishing to have it believed that certain troops of the King, on the 16th of August, 1819, wantonly and cruelly cut down certain of his Majesty's subjects; did, on 22nd August, at Loughborough, in the county

† See this case cited by KELLY, C.J. in *R. v. Holmes* (1883) 12 Q. B. C.B. in *R. v. Rogers* (1877) 3 Q. B. D. D. 23, 24.—R. C.
28, 33; and by Lord COLERIDGE, ‡ But see now 6 & 7 Vict. c. 96, s. 6.

THE KING of Leicester, compose, write, and publish, and cause and procure
v.
BURDETT. to be composed, written, and published, a certain libel, which
 purported to be an address to the electors of Westminster, set
 out in the information. Plea, not guilty. At the trial, before
 Best, J. at the last Assizes for the county of Leicester, it was
 proved by Mr. Brookes, that he, either on the 23rd or 24th of
 August, received, in London, a letter containing the libel, from
 Mr. Bickersteth, a professional gentleman. The libel was in the
 [*718] form of *an address, in the handwriting of the defendant, and
 dated from his residence, Kirby Park, which was in Leicestershire.
 He received, at the same time, an envelope, which he
 had lost; this was also in the handwriting of the defendant,
 and had no date either of time or place. The witness did not
 know whether it bore a postmark. The envelope contained
 directions addressed to Mr. Bickersteth, to pass it to him, Brookes,
 for publication; he accordingly published it in the London
 newspapers. It was further proved, by a toll-gate keeper, near
 Kirby Park, that he had seen the defendant riding on horseback,
 on the 22nd and 23rd of August; the gate was about 100 yards
 from the defendant's house.† It was objected that there was no
 proof of any publication in Leicestershire. The learned Judge
 was of opinion there was evidence for the jury, and he directed
 the jury, that, inasmuch as Brookes had received the letter open
 in Middlesex, and there was no evidence that it was ever closed;
 it was open to them to consider whether the defendant had so
 delivered the letter open to Bickersteth, in the county of
 Leicester. If they thought he had, then that was a publication
 in the county of Leicester. The jury found the defendant guilty.

Denman, in Easter Term, moved for a new trial, on the ground
 that there was no proof of an actual publication in Leicestershire.
 [His argument commenced in Easter Term, was continued, in
 [*720] his absence, in Trinity Term following, by *Phillips*, who *made
 three points. First, the mere writing of a paper, not followed
 by publication, is not an offence by the law of England, however
 slanderous or seditious that writing may be. Secondly, the

† Further particulars of the evidence given will be found stated in the
 judgment of Best, J. p. 543 below.

defendant could not be legally tried in the county of Leicester, unless there was a publication in that county. Thirdly, there was not any proof of the fact of publication in Leicestershire. A rule *nisi* having been granted, on a subsequent day :]

THE KING
v.
BURDETT.

The *Attorney* and *Solicitor-General* shewed cause :—

[746]

The writing and composing a libel with a criminal intent, is an offence by the law of England, although it be *not published. Secondly, admitting the publication to be part of the offence charged in this information, still the composing and writing are other parts of the offence, and the venue may be laid in the county where any part of the offence was committed. Thirdly, there was sufficient evidence of a publication.

[*747]

[On the first point they cited *Lamb's* case, 9 Co. Rep. 59; *R. v. Paine*, 5 Mod. 163; *R. v. Beare*, 1 Ld. Ray. 414, 3 Salk. 226; *R. v. Knell*, 1 Barnard, 305; *The Seven Bishops' case*, 12 Howell's St. Tr. 331; *R. v. Tutchin*, 14 Howell's St. Tr. 1129; *Elliott's case*, 2 East, P. C. 951; *R. v. Crocker*, 2 Bos. & P. (N. R.) 87; *R. v. Ward*, 1 Ld. Ray. 1469; *R. v. Watson*, 1 Camp. 215; *R. v. Williams*, 11 R. R. 781 (2 Camp. 506).

On the second point they cited *Hale*, P. C. 652; *Hawkins* Pl. C. Book 2, s. 37; *Hobson's case*, East, Pl. C. Addenda xxiv; *Esser's case*, 2 East, Pl. C. 1125; *Scott, qui tam v. Brest*, 2 T. R. 238, per ASHHURST, J.; *R. v. Brisac*, 7 R. R. 551 (4 East, 164); *R. v. Bowes*, 7 R. R. 557 (4 East, 171).

On the third point they cited *R. v. Watson*, and *R. v. Williams*, *supra*; *Metcalf v. Markham*, 3 T. R. 652; and *R. v. Hensey*, 1 Burr. 642.]

Scarlett was then heard in support of the rule; and, in [Michaelmas] Term, [1820,] *Denman*, *Phillips*, *Blackburne*, and *Evans*, were heard on the same side. The arguments in support of the rule were as follow :

1820.
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MICHAELMAS
TERM.

[4 B. & Ald.
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The writing of a libel, without publication, does not constitute an indictable offence. The crime of libel consists in the tendency to a breach of the peace produced *by the communication of slander to the minds of others, by writing. No crime is therefore committed until the slander is so communicated; or, in other

[*96]

THE KING
v.
BURDETT. words, until the publication, for till then there can be no tendency to a breach of the peace.

[The cases cited on the other side were commented on, and the following were cited :—*Entick v. Carrington*, 19 Howell's St. Tr. 1030, *R. v. Eades*, 2 Shower, 468, *R. v. Williams*, 2 Shower, 468, and *R. v. Harris*, 7 Howell's St. Tr. 969.]

[108] It has been further argued, that where several acts constituting an offence, take place in different counties, the offender may be indicted in any of those counties ; and that in this case, inasmuch as the offence is composed of the writing and publishing, and the writing took place in Leicestershire, that the defendant may be indicted in that county, although the libel was
[109] only published in Middlesex. * * If the rule contended for be the correct one, the power which it would give to the Crown to multiply its tribunals would be indeed alarming. * * *

It has been further contended, that in this case there was evidence of a publication in Leicestershire ; and it is said, that where a libel has been put into circulation by the act of the defendant, it must be taken to be published by him in the place in which he parted with the possession of it for the purpose of publication ; and that, in this case, it was clear, at all events, from the evidence, that the defendant did part with the possession of the libel in Leicestershire, either by putting it into the post, or delivering to a servant or to some other person for the purpose of transmitting it to London. * * *

[113] The only question submitted to the jury upon the question of publication was, whether, inasmuch as the letter was never proved to have been sealed, Sir F. Burdett might not be presumed to have delivered it open in the county of Leicester. Now, that
[*114] proposition *involves two parts: first, that Sir F. Burdett delivered the letter to some person in the county of Leicester ; and, secondly, that he delivered it open. There was no evidence to support either part of this proposition. * * *

[115] Another ground upon which the defendant is entitled to a new trial is, that the learned Judge rejected evidence of the truth of the facts represented in the libel to have taken place at Manchester. Now, that evidence ought to have been received ; because the effect of it might be to alter wholly the nature of the

libel. If the facts were true, the question, whether the publication were a libel or not, would depend upon this, viz. whether the comments were warranted by the facts. If, on the other hand, the facts were false, the very statement of them would constitute a libel.

THE KING
v.
BURDETT.

Another ground of objection to the verdict is, that the learned Judge told the jury that they were to take the law from him as to whether this were a libel or not. Now, by the 32 Geo. III. c. 60, the jury are empowered to give a general verdict upon the whole matter in issue; and, consequently, are to find whether the publication be a libel or not.

Cur. adv. vult.

There being a difference of opinion on the Bench, the Judges now delivered their opinions *seriatim*.

BEST, J.:

Nov. 27.

This case came on for trial before me at the Spring Assizes for the county of Leicester. On *the part of the prosecution it was proved, by Mr. Brookes, that the libel in question was delivered to him *by Mr. Bickersteth, on the 24th August; he did not state where, but I think it fair to presume that it was delivered at the place of his abode in Middlesex. Mr. Brookes's memory did not enable him to state distinctly the manner in which the paper came to his possession. He said that the envelope which had covered it was destroyed. He could not say whether it had an address on it or not; but, to the best of his recollection, it was addressed to Mr. Bickersteth. Where Mr. Bickersteth lived did not appear, nor who he was, further than that *he was the professional friend of Sir Francis Burdett. There was not any seal or trace of a seal on the envelope, nor was there any post-mark either on the envelope or paper. The paper was dated Kirby Park, August 22nd; and it appeared in evidence that Kirby Park was in Leicestershire, but at no great distance from the boundaries of the counties of Leicester and Rutland. It also appeared, from the evidence of a toll-gate keeper near Kirby Park, that Sir Francis Burdett was seen in Leicestershire on the 22nd August, and again on the following day. There was no

[*116]

[*117]

[*118]

THE KING
v.
BURDETT.

[*119]

evidence of his having left the county of Leicester till after the publication of the paper, which took place on the 25th August. The paper, to be ready for publication on the 25th, must have been sent from the defendant's seat in Leicestershire (which is nearly 100 miles from London) on the evening of the 23rd (on which day the defendant was seen riding near the toll-gate), or the morning of the 24th. The only words that, according to Mr. Brookes's memory, were within the envelope, or any other part of the papers, besides the libel, were, "Forward this to Brookes." There was no express direction to him to publish it; and his only reason for thinking the defendant intended that it should be published was, that it was addressed to the electors of Westminster. It further appeared that Sir Francis Burdett, on Mr. Brookes being called upon by Lord Sidmouth to deliver up the author, wrote this letter: "Cottisbrook, August 28. My Lord, hearing your Lordship had applied to the gentleman through whose hands my address to the electors of Westminster was transmitted to the newspapers, to give up the author, and had, at the same time, intimated that a refusal would subject him, as well as the editors of the papers, to a *Ministerial prosecution; I take the liberty, in order to save your Lordship further trouble, and also the gentleman above mentioned an unjust prosecution, to inform your Lordship, that I am the author of the address in question; and, moreover, to assure your Lordship, that although penned in a hurry, and under the influence of strongly excited feelings, I can discover nothing in it, on a re-perusal, unbecoming the character of an honest man and an Englishman." At the close of the evidence on the part of the prosecution it was contended, that there was no evidence that the libel in question had been published in Leicestershire. After hearing the argument, I thought that there was not only such evidence of a publication in Leicestershire as I was bound to leave to the jury, but it appeared to me then, and appears to me now, that, unless it received an answer, it was cogent evidence for the jury to find the verdict which they have found. I stated shortly to the learned counsel, that my opinion was, that there was evidence to be laid before the jury, by which I meant them to understand that, if they thought proper, they might offer evidence on the

THE KING
v.
BURDETT.

part of the defendant, to rebut the inference which the evidence on the part of the prosecution had raised of a publication in Leicestershire. No evidence was offered on the part of the defendant. The case was defended by the Honourable Baronet himself most ably—he said but little on the question of venue; but he contended that it was impossible to impute to him the intent charged in the information. I told the jury that there were two questions for their consideration. The first was, whether there was a publication of the libel in Leicestershire; and, secondly, if they should be of opinion that the paper was published in Leicestershire, whether the paper, *under the circumstances in which it was published, was a libel. I stated to them the evidence that had been given. I pointed out to them the opportunity the defendant had of answering the evidence for the prosecution by evidence which I thought he might have been prepared to offer. With respect to whether this was a libel, I told the jury that the question, whether it was published with the intention alleged in the information, was peculiarly for their consideration; but I added, that the intention was to be collected from the paper itself, unless the import of the paper were explained by the mode of publication, or any other circumstances. I added, that if it appeared that the contents of the paper were likely to excite sedition and disaffection, the defendant must be presumed to intend that which his act was likely to produce. I told them further, that if they should be of opinion that such was the intention of the defendant, then it was my duty to declare, that, in my opinion, such a paper, published with such an intent, was a libel; leaving it, however, to them, (as I was aware at the time that I was bound to do under the Act of Parliament of the 32 Geo. III. c. 60, s. 1) to find whether it was a libel or not. The jury found the defendant guilty. A motion has been since made for a new trial, and I am extremely glad that this case has been fully discussed, and that the defendant has had the advantage of the ablest counsel whom the Bar of this or any country could afford. All that talent, industry, and learning could bring forward, has been urged by the gentlemen on each side. I hope, therefore, that we are enabled, by the assistance of the Bar, to form an accurate judgment on this case.

[*120]

THE KING
v.
BURDETT.
[*121]

Three objections were taken when the rule was moved. The first objection is, that there was no evidence that *the libel was published in the county of Leicester. I have to observe on that point, that if there was any evidence, it was my duty to leave it to the jury, who alone could judge of its weight. The rule that governs a Judge as to evidence, applies equally to the case offered on the part of the defendant, and that in support of the prosecution. It will hardly be contended, that if there was evidence offered on the part of the defendant, a Judge would have a right to take on himself to decide on the effect of the evidence, and to withdraw it from the jury. Were a Judge so to act, he might, with great justice, be charged with usurping the privileges of the jury, and making a criminal trial, not what it is by our law, a trial by jury, but a trial by the Judge. It must be borne in mind, that the question is not whether the evidence was such as ought to have satisfied a jury of the fact of publication in Leicestershire, but whether any facts were proved, which raised a presumption of publication in that county. If there were any such facts, I could not deal with them otherwise than I did. I am of opinion that there was evidence in this case, on the part of the prosecution, which raised a strong presumption, that the libel was published in Leicestershire; and no attempt having been made to rebut such presumption, it became, in my mind, conclusive proof of that fact. It has been said, that there is to be no presumption in criminal cases. Nothing is so dangerous as stating general abstract principles. We are not to presume without proof. We are not to imagine guilt, where there is no evidence to raise the presumption. But when one or more things are proved, from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it did *happen, as well in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable inference. It is enough, if its existence be highly probable, particularly if the opposite party has it in his power to rebut it by evidence, and yet offers none; for then we have something like an admission that the presumption is just. It has been solemnly decided, that there is no difference between the rules of evidence in civil and criminal cases. If the rules of

[*122]

THE KING
v.
BURDETT.

evidence prescribe the best course to get at truth, they must be and are the same in all cases, and in all civilised countries. There is scarcely a criminal case, from the highest down to the lowest, in which courts of justice do not act upon this principle. Lord MANSFIELD, in the *Douglas* case, gives the reason for this. "As it seldom happens that absolute certainty can be obtained in human affairs, therefore reason and public utility require that Judges and all mankind, in forming their opinions of the truth of facts, should be regulated by the superior number of probabilities on one side and on the other." In the highest crime known to the law, treason, you act upon presumption. On proof of rebellion, or the endeavour to excite rebellion, you presume an intent to kill the King. In homicide, upon proof of the fact of killing, you presume the malice necessary to constitute murder, and put it on the prisoner, by extracting facts in cross-examination, or by direct testimony, to lower his offence to manslaughter, or justifiable homicide. In burglary and highway robbery, if a person is found in possession of the goods recently after the crime, you presume the possessor guilty, unless he can account for the possession. In the case of a libel, which is charged to be written with a particular intent, *if the libel is calculated to produce the effect charged to be intended, you presume the intent. It therefore appears to me quite absurd, to state that we are not to act upon presumption. Until it pleases Providence to give us means beyond those our present faculties afford, of knowing things done in secret, we must act on presumptive proof, or leave the worst crimes unpunished. I admit, where presumption is attempted to be raised, as to the *corpus delicti*, that it ought to be strong and cogent; but in a part of the case relating merely to the question of venue, leaving the body of the offence untouched, I would act on as slight grounds of presumption as would satisfy me in the most trifling cause that can be tried in Westminster Hall. I shall now state why I think there was a ground raised for presuming that this libel was published in Leicestershire. If this presumption had not led us to the truth, it is quite clear it would have received an answer. The defendant came prepared to dispute the publication in Leicestershire. I must suppose he came armed with the means of doing so; he had nothing to do

[*123]

THE KING
v.
BURDETT.

[*124]

but to call Mr. Bickersteth, to prove where the paper first saw the light. If it was first delivered from the hand of the defendant in London or Middlesex, Mr. Bickersteth could have had no difficulty in proving the fact. It has been said, that the prosecutor ought to have called him. Did he know that such a person existed? Could he know that he had even touched this paper? Such knowledge could only have been obtained from Mr. Brookes, and he was not disposed to communicate it to the prosecutor. The law does not impose impossibilities on parties; it expects, that a man who has the means of knowing who may be witnesses, shall call them. The presumption is, that the *paper was delivered open in Leicestershire. In Phillipps on Evidence, p. 152, 4th edit. it is said that the civilians' definition of presumption is "Præsumptio nihil aliud est quam argumentum verisimile communi sensu perceptum ex eo quod plerumque fit aut fieri intelligitur." Presumption means nothing more than, as stated by Lord MANSFIELD, the weighing of probabilities, and deciding, by the powers of common sense, on which side the truth is. Now let us see what are the facts of this case, that raise the presumption of the paper having been delivered open in Leicestershire. First, it is clear, that it was written in Leicestershire, for it was dated Kirby Park, Leicestershire; and it was held, in the case of *The King v. Dr. Hensey*,† that the date of a place in a letter, is evidence that it was written there. Then the next fact is, that on the 24th August the letter reached London. Now, Sir F. Burdett is proved, not only on the 22nd but on the 23rd August, to have been in Leicestershire, not travelling to London, but riding out in the neighbourhood of his own house. It is clear, therefore, that it did not pass from his hands, in Middlesex, to those of Brookes, but from the hands of Bickersteth. This evidence, leaving Sir F. Burdett in Leicestershire, and shewing a delivery by another person to Brookes, raises a presumption that it was sent by him, and not carried by him out of the county. If it was sent out of the county, in what state was it sent? I am to presume a thing always in the state in which it is found, unless I have evidence that, at some previous time, it was in a different state. It was presented to Brookes

† 1 Burr. 644.

open; why then am I to presume it was ever inclosed? If the envelope had had a *broken seal, I should have thought that evidence that it had been closed, and that Bickersteth, to whom Brookes thinks it was addressed, had opened it. But there was no trace of any seal having ever been attached to it. If it came in that envelope it must have been open; and that it came in that envelope, is evident from the address to Bickersteth being on it. Brookes thought there was no post mark on it. Do not all these facts shew, that it was not sent by the post, but by some private hand (either that of Bickersteth, or some other person), and that the words on the outside of the envelope, and which Brookes thought was an address to Bickersteth, and the words in the inside, "forward it to Brookes," were only memoranda, as to what was to be done with the paper when it arrived in London. It has, to my mind, nothing of the appearance of a paper sent by the post. If sent by the post, why was it not franked direct to Mr. Brookes? If it was thought right to submit it for the first time to Bickersteth, in London, for his opinion, the envelope would have contained something more of the form of a letter from one gentleman to another, than forward this to Brookes. If we act according to the rule laid down by Lord MANSFIELD and the civilians, to judge according to the weight of probabilities, we have then the highest degree of probability on the one side—without any thing to weigh against it on the other, that this paper was delivered either to Bickersteth, in Leicestershire, or to some other person in the confidence of the defendant; and that he thought it right to trust it to such person open, that he might carry it to Bickersteth. On these grounds, I am of opinion that it was not only proper for me (according to the principles on which justice is administered) to leave this case to the jury in *the way I did, but that the jury could find no other verdict than that which they have found.

THE KING
v.
BURDETT.
[*125]

[*126]

But supposing it to have been sent by the post, my opinion is, that such a sending of it amounted to a publication. It is assumed that publication means a manifestation of the contents. I deny that such is the meaning of the word publication. In no part of the law do I find that it is used in that sense. A man publishes an award, but he does not read it. Again, he publishes

THE KING ^{v.} a will, but he does not manifest its contents to those to whom he
 BURDETT. makes the publication ; he merely desires the witnesses to take
 notice that the paper to which they affix their different attestations is his will. So in the case of a libel, publication is nothing more than doing the last act for the accomplishment of the mischief intended by it. The moment a man delivers a libel from his hands his control over it is gone ; he has shot his arrow, and it does not depend upon him whether it hits the mark or not. There is an end of the *locus pœnitentiæ*, his offence is complete, all that depends upon him is consummated, and from that moment, upon every principle of common sense, he is liable to be called upon to answer for his act. Suppose a man wraps up a newspaper and sends it into another county by a boy ; who is the publisher ? the boy who perhaps cannot read or is ignorant of its contents, or the man who has put it up in the envelope ? The boy who carries it is merely an innocent instrument ; there can be no other publisher but the person who sent it, and who publishes it when he delivers it to the boy. If the sending of a letter by the post be not a publication in the county from whence it is sent, how is a libeller to be punished who sends his libel by the post to some foreign country for circulation ? The libeller will not go to the foreign country that he may be punished there.

[*127] If the *sending it from England be not a publication, (as it is contended at the Bar,) can it be insisted, when the libel is completed by publication, that such a libeller can no where be punished ? A British subject might libel with impunity, in a foreign land, his sovereign, his government, or any distinguished individual whose fame extended beyond the limits of his own country ; and the foreign disseminator would have this strong appeal to the mercy of his own laws, that being sent to him from a person in England he believed the libel to be true. But there is authority for saying that this is a publication. In the case of *The King v. Watson* it was contended, that the post-mark was proof of the letter having been put into the post at Islington, and that such putting into the post amounted to a publication. Lord ELLENBOROUGH held the proof of the publication of the letter insufficient. Why ? because there was no proof that there was the post-mark, and that what appeared to be the post-mark

THE KING
v.
BURDETT.

might have been a forgery. Now, he would not have said so, if he had thought that putting the letter into the post-office at Islington did not amount to a publication. If he had said the putting the letter into the post was not a publication, he would have been inconsistent with himself, a circumstance which the soundness of his judgment would have prevented. For in the case of *The King v. Williams*, which was for sending a challenge in a letter, Lord ELLENBOROUGH said there was a publication in Middlesex by putting it into the post-office there, with intent that it should be delivered at Windsor. Lord ELLENBOROUGH does not say that this is a sufficient sending of a challenge, but a sufficient publication; nor can there be any difference between that case and any other libel. Why are libels against individuals *prosecuted? because they have a tendency to provoke the party, to whom they are sent, to a breach of the peace. There can be no distinction between a libel sent with an express intent to provoke a breach of the peace, and any other libel on an individual. This case is directly in point to prove that the putting of a letter into the post is a sufficient publication. Had not the civil law been quoted by the counsel for the defendant, I should not have referred to it, although I think it strongly confirmatory of my opinion. The description of a libeller in our indictments seems to me to have been borrowed from the civil law, and I agree that their word *edo* is represented by our word "publish;" but I deny that *edere* means to manifest the contents of a paper. Both in the Roman classics and law books it means the act of delivery, which precedes the manifestation of the contents; and the subsequent manifestation is expressed by some other term, as *exponere* or *manifestare*. Thus, in Cicero, De Legibus, lib. 3, art. 20, he says, "apud eosdem qui magistratu abierint *edant et exponant* quid in magistratu gesserint." Here, the word "*edant*" means "they uttered," and the word "*exponant*," "they exposed to public view what was so uttered." So, in the civil law, in the Codex, lib. 9, tit. 36, we have this passage: "Si quis famosum libellum ignarus repererit, aut corrumpat priusquam alter inveniatur aut nulli confiteatur inventum. Si vero non statim easdem chartulas corruperit vel igne consumpserit, sed earum vim manifestaverit sciat se ut auctorem hujusmodi

[*128]

THE KING
BURDETT. ^{6.} delicti capitali sententiæ subjugandum." Here, the word *ediderit* is not used, but *manifestaverit*. Why? because it constituted no crime for a person who found a paper, and, being ignorant of its contents, delivered it to another. To punish him with death
[*129] *would have been a species of cruelty of which the worst of the Romans were incapable; but if, instead of destroying it, he manifested it, then he was to be considered as the author. The reason I quote this passage is to shew that where "*ediderit*" is used it means a delivery only; but when they intend to express a disclosure of the contents of a paper, they use the word *manifestaverit*; and thus, both according to the civil and the English law, whether this paper were delivered open or wrapped up in a hundred envelopes, the delivery was a publication.†

† We would venture with great deference to the learned Judge, to suggest that possibly it may be found on examination that the word *Edo* is not unfrequently used by the best writers to express a publication in the popular sense of the word. Quintilian, iii. 7, speaking of Cicero's publications, uses the phrase, *Editi in competitores, in L. Pisonem, et Clodium, et Curionem libri vituperationem continent*. And Cicero himself, in various passages, has employed the same expression in the same sense. As for instance: *Scripsi etiam versibus tres libros de temporibus meis, quos jam pridem ad te misissem, si esse edendos putassem*. Epist. ad Fam. Lib. i. 9. *Nec se tenuit quin contra doctores librum etiam ederet*. Acad. Quæst. iv. 12. *Non occultavi (tabulas) non continui domi; sed describi ab omnibus statim librariis, dividi passim, et pervulgari et edi Populo Romano, imperavi*. Pro Syll. 15. *Ut annales senex emendem atque edam*. Ad Atticum, ii. 16. *Leges autem a me edentur non perfectæ*. De Legibus, ii. 18. There is another passage which shews this use of the word in a strong light. It is well known that Cn. Flavius first made public the "actiones" of the lawyers,

which, till then, had been kept secret by them. And Cicero thus alludes to it, *Augendæ potentiæ suæ causâ pervulgari artem suam noluerunt: deinde posteaquam est editum expositis a Cn. Flavio primum actionibus, &c*. De Oratore, i. 41. In the books of the civil law, the definition of the word *edere* is *Copiam describendi facere, in libello complecti et dare, vel dictare* [D. 2, 13, *de edendo*, 1, § 1; the term includes what we now call discovery.—F. P.]; which refers to the custom of the plaintiff inscribing in the book of the Prætor, his cause of complaint against the defendant, and afterwards of serving his declaration upon the opposite party. Budæus inquit "*edere*" apud jurisconsultos est, quod nunc, per scriptum dare, vel per declarationem, dicunt. These authorities shew, that amongst the Roman writers, the word *Edo*, when applied to books, annals, and the like, meant "to make public." And amongst the civilians, even in its technical use, it implied a particular mode of making public, prescribed by the law, viz. by the inscription in the Prætor's book. It undoubtedly also included the delivery of the declaration to the opposite party, which possibly may

I come now to another point, viz. the rejection of the evidence of that which was done at Manchester, which it was contended ought to have been received for the purpose of explaining the libel. Now in the first place there was no ambiguity to explain. There was no part of the libel that was not intelligible without the aid of evidence. In the next place, it was clear that notwithstanding any thing which might have passed at Manchester, many parts of this letter were libellous. Nothing that passed there could explain the allusion to the commencement of a reign of blood and terror in this country, or have applied to what is said in the libel of the soldiers having the living flesh torn from their bones; or to what is perhaps the strongest part of it, the allusion to the abdication of King James. The paper would, therefore, at all events, have remained a highly aggravated libel. It is not like the case of *The King v. Horne*.† There the defendant did not insist on the truth of the libel, but the indictment having charged him with libelling the King's troops, he endeavoured to shew that those whom he had libelled were not the King's troops; the evidence was admitted only to remove an ambiguity, but there is no obscurity like that in the present case. The defendant in that case offered the evidence, but it failed; and Lord MANSFIELD said, that from the evidence he produced, it appeared clearly that they were the King's troops; his words are, "in this case the defendant gave evidence, but demonstrated that the libel related to the troops acting under the King's authority."

THE KING
v.
BURDETT.
[130]

Another point on which the motion for a new trial was made was, that I took upon myself to lay down the law to the jury as to the libel, and that since the statute 32 Geo. III. c. 60, I was not warranted in so doing. I told the jury that they were to consider whether the paper was published with the intent charged in the information; and that if they thought it was published

[131]

account for its being apparently used sometimes in the more restricted sense. In the passage from Cicero, quoted by the learned Judge, it should be observed, that the words "edant et exponant," are not applied to any book or written composition, and in that case the word may pro-

bably admit of a different interpretation to the one here suggested. See Stephani Thesaurus Linguae Latinae; and Vicat. Vocabularium Utriusque Juris. (Note by the Reporters.)

† Cowp. 682, 11 St. Tr. 264, 20 How. St. Tr. 651.

THE KING
v.
BURDETT.

with that intent, I was of opinion that it was a libel. I, however, added, that they were to decide whether they would adopt my opinion. In forming their opinion on the question of libel, I told the jury that they were to consider whether the paper contained a sober address to the reason of mankind, or whether it was an appeal to their passions, calculated to incite them to acts of violence and outrage. If it was of the former description, it was not a libel; if of the latter description, it was. It must not be supposed that the statute of Geo. III. made the question of libel a question of fact. If it had, instead of removing an anomaly, it would have created one. Libel is a question of law, and the Judge is the judge of the law in libel as in all other cases, the jury having the power of acting agreeably to his statement of the law or not. All that the statute does is to prevent the question from being left to the jury in the narrow way in which it was left before that time. The jury were then only to find the fact of the publication, and the truth of the innuendoes; for the Judges used to tell them that the intent was an inference of law, to be drawn from the paper, with which the jury had nothing to do. The Legislature has said that that is not so, but that the whole case is to be left to the jury. But Judges are in express terms directed to lay down the law *as in other cases*. In all cases the jury may find a general verdict; they do so in cases of murder and treason, but there the *Judge tells them what is the law, though they may find against him, unless they are satisfied with his opinion. And this is plain from the words of the statute, which, after reciting that doubts had arisen whether on the trial of a libel the jury may give their verdict on the whole matter in issue, directs that "they shall not be required or directed by the Judge to find the defendant guilty merely on the proof of the publication, and the sense ascribed to it by the indictment." But the statute proceeds expressly to say, that "on every such trial the Judge shall, according to his discretion, give his opinion to the jury on the matter, in like manner as in other criminal cases." That was all that was done on this occasion, and, therefore, I am of opinion that this objection also fails. As to the libel itself, considering it as the production of a man of large fortune, high rank, and extensive influence, where

[*132]

THE KING
v.
BURDETT.

is the person that can make an observation in favour of any part of it? My opinion of the liberty of the press is, that every man ought to be permitted to instruct his fellow subjects; that every man may fearlessly advance any new doctrines, provided he does so with proper respect to the religion and government of the country; that he may point out errors in the measures of public men, but he must not impute criminal conduct to them. The liberty of the press cannot be carried to this extent without violating another equally sacred right; namely, the right of character. This right can only be attacked in a court of justice, where the party attacked has a fair opportunity of defending himself. Where vituperation begins, the liberty of the press ends. This maxim was acted upon by the greatest states of antiquity. In our country, the liberty of the press allows us to persuade men to use their constitutional influence over their representatives *to obtain in the regular parliamentary manner a redress of real or supposed grievances. But this must be done with temper and moderation, otherwise instead of setting the Government in motion for the people, the people may be set in motion against the Government. In such a case as this it is fit that the public should know the grounds on which I have acted. Whether I shall persuade others that I have acted right I know not. It is enough for me as an Englishman, to be myself satisfied that I have done so. We have been desired to consider what posterity will think of our judgment. I am not insensible to this consideration, but I value only the good opinion of those who love their country and wish to preserve it in peace. Of their censure I am not afraid. I have acted upon this occasion with the firmness which the times in which we live particularly require, but I trust I have not lost sight of that which ought in all times to guide a Judge in this country, where every magistrate is reminded by the oath of his Sovereign, that it is his first duty to administer justice in mercy.

[*133]

HOLROYD, J. :

This is a motion for a new trial which has been made and supported in argument on various grounds with the greatest ability; but after hearing and most attentively considering

THE KING
v.
BURDETT.

[*134]

every thing that has been suggested by the learning and ingenuity which on this occasion we have heard displayed, and the authorities that have been relied upon or discussed, I am of opinion, that the rule for a new trial ought not to be made absolute. The case appears to me to have been sufficiently proved at the trial to warrant the verdict given against the defendant. The proofs are direct and positive, not only that the paper writing charged to be a *libel was published, but also that Sir Francis Burdett was the author of it; that the same was in fact not only composed and written, but that it was also published, by him. I am not at present speaking of any proof either positive or presumptive, of an act of publication by him in Leicestershire. I am now speaking of the proof merely of an act of publication by him somewhere. That he was not only the composer and writer, but also that he published it, is directly proved by evidence of his hand-writing to the libel and its envelope, and by the contents of that envelope directing Mr. Bickersteth to pass it to Mr. Brookes, and further by his letter to Lord Sidmouth, in which he not only expressly acknowledges himself to be the author of the paper writing charged to be a libel, but the fact also of his having sometime before sent it up to town. So that it is established by direct proof, not only that the paper writing in question was composed and written by him, but also that the *locus pœnitentie* of the writer was passed by his having parted with the possession of it. His own act of sending away the letter, his publishing it to Mr. Bickersteth, and the publication of it to Mr. Brookes by his own direct authority and order, are decisive on this point. But, if necessary, we have, in addition to the positive proofs of a complete *corpus delicti* having been committed by the defendant somewhere, by his writing and publishing the letter in question, pregnant proofs, afforded by the very contents of the letter itself, that it was originally composed not with a view of keeping it for any time to himself, for any further consideration whether it should be published or suppressed, but with the intent that it should speedily be published and acted upon. For from its being addressed to the electors of Westminster, and from the *haste in which it appears to have been written, evidently for the purpose of dispatch, it

[*135]

THE KING
v.
BURDETT.

is clear that the defendant intended that it should be acted upon by others in the speedy call of public meetings on the subject. So that the proofs are not only of a writing and publishing by the defendant, but also that the letter was originally written by him with the intent, and for the purpose of its being published, and that that was the sole cause and object of its being written. That it was written at Kirby Park in Leicestershire, is proved, and indeed is admitted to have been proved by its date. And upon this part of the case *The King v. Hensey*, which was cited, is an authority in point. These circumstances, all of which were proved or admitted at the trial, being taken into consideration, it appears to me, that the jury of the county of Leicester had a jurisdiction by law over the offence with which the defendant was charged.

Writing a libel with the intent and for the purpose of its being published (under circumstances not sufficient in law to justify or excuse the writer for so doing), followed by a publication by the act, or under the authority of the writer, is in my opinion, by the law of England, a misdemeanor, and triable in the county where such writing took place, though the publication be in some other county. I do not say whether all those qualities are or are not necessary to be attached to or connected with the act of writing, in order to make it a misdemeanor. It is not necessary at present to consider or give any opinion upon any such case, and still less upon a case where the writing remains confined by the author to his own closet or privacy, or has been obtained from thence, and published without his privity or consent. *How far the case of *The King v. Beare* may be borne out or supported in law to that extent, I have not in the present case considered, nor do I mean now to give my opinion upon it. The present case, I think, does not require it, being quite distinguishable; and every thing said by me in this case, will, as I conceive, leave my judgment, as well as that of others, quite unfettered in any such cases as I have last supposed, if unfortunately any such should arise. Where a misdemeanor has been committed by a defendant by writing and publishing a libel, the writing of such a libel so published, is in my opinion criminal, and liable to be punished by the law of England as a misdemeanor, as well as the publish-

[*136]

THE KING ing of it. The crime in such a case is not confined to the
BURDETT. publishing of it alone. The constant form in which the charge is alleged in indictments and informations, shews this. Where the facts of the case are expected to support it, the indictment or information does not confine the offence charged to publishing the libel merely, but alleges the composing or the writing of it as part of the crime; and where the party prosecuted has been acquitted of publishing it, and found guilty of writing it, judgment has passed against the defendants, not merely in *The King v. Beare*, but in the subsequent cases of *The King v. Knell*,† and *The King v. Carter*,‡ for the preceding parts which the several defendants had taken with respect to the libel, whether it were in printing, composing, or writing them. The charge against this defendant is an aggregate offence; a misdemeanor consisting of different parts, viz. the composing, writing, and publishing; and if so much of that charge be proved to have been committed in the county of Leicester, as is in law a misdemeanor, it is perfectly *clear that he might be found guilty of that part alone, and that judgment thereupon must pass against him *pro tanto*. The composing and writing, with the intent and for the purpose above stated, of a libel proved to have been published by the defendant, is in my opinion, of itself a misdemeanor, in whatever county the publishing of it took place, and is, I think, triable in the county where the libel was composed and written. The jury of that county, I take it to be clear, may inquire into any fact, though in another county, so far at least as tends to prove that to be an offence which has been done in their own county. So far, therefore, at least as the defendant's publishing the libel elsewhere, tends to prove his *composing and writing* of it to be criminal, the jury of the county where it was composed and written, clearly, I think, may inquire of, and take cognizance of it. This is constantly done in the case of overt acts of high treason, and of acts of conspiracy, committed out of the county, in order to establish or confirm the charge of treason or conspiracy within the county.

But it is urged, that if the defendant were found guilty of the composing and writing, and not of the publishing, this informa-

† 1 Barnardiston, 305.

‡ No reference in the original report.

[*137]

THE KING
v.
BURDETT.

tion does not contain a sufficient charge of composing and writing, so as to make composing and writing in that case criminal, inasmuch as it does not allege that the defendant wrote it with intent to publish it. Now, without considering how far an information in such a case would or would not be sufficient to convict the writer upon it, unless such an allegation, either directly or to that effect, were contained in it, the information does in this case, I think, contain an allegation, not only to that extent and effect, but even *further : for it alleges that the defendant, intending to excite discontent and sedition amongst the King's subjects, and particularly amongst the soldiers, &c. &c. composed, wrote, and published the libel. This allegation of the intent is applicable to each of the acts charged upon the defendant : to the composing and writing, as well as the publishing. And, therefore, as such discontent and sedition could not be excited amongst the soldiers of the King without publishing the libel, the information in effect alleges that the defendant composed and wrote it for the purpose of its being published, in order to effect those further purposes of mischief which could not be accomplished by it, unless by its publication.

[*138]

But further, I think the jury may inquire into, and take cognizance of those facts which are done out of their county, for the purpose of finding a defendant guilty, not only of so much of the crime as was committed within the county, but also of the remainder of the aggregate charge, in those cases, where so much of the misdemeanor charged as is proved to have been done within their county, is of itself a misdemeanor. If that be so, it would warrant this verdict in its full extent, whether the publication of this libel is deemed to have been in the county of Leicester or not. And this is established to be the law, in the cases of conspiracies and nuisances, in both of which the juries do not confine their verdicts of guilty to such criminal acts or consequences as occur in the county where the conspiracy or erection of the nuisance is laid and proved, but extend them to such further acts and consequences of conspiracy and nuisance, as may occur or arise in another county ; and judgment and punishment are in *such cases given and awarded to the full extent of the aggregate offence. The cases of felony have been urged as bearing on the present case, particularly those provided

[*139]

THE KING
v.
BURDETT.

for by the statute of Philip and Mary, but those are, I think, distinguished from, and do not apply to the present question.

It has, however, been further urged, that there ought to be a new trial, because the verdict was found upon the learned Judge's telling the jury that there was evidence before them to shew that the libel was published by the defendant in Leicestershire; that it might be presumed to have been delivered by the defendant to Mr. Bickersteth there, and even in the state in which it was afterwards delivered to Mr. Brookes, namely, open. From what I have stated above, it appears that my opinion must be, that by law the learned Judge need not have gone so far in favour of the defendant as to put it to the jury to consider whether, from the evidence given, they would presume and find that the defendant had published the libel in Leicestershire, which would have given him the benefit of an acquittal, in case they had thought the evidence not sufficient for them to make that presumption; because, for the reasons I have above stated, I think the verdict ought to have been the same, whether the defendant had published the libel in that or any other county. It is certainly true, and I most ardently hope that it will ever continue to be the case, that by the law of England, as it was urged and admitted in the case of the *Seven Bishops*,† no man is to be convicted of any crime upon mere naked presumption. A light or rash presumption, not arising either necessarily, probably, or reasonably, from the facts proved, cannot avail in law. That is the presumption spoken *of in the *Seven Bishops*' case, which is no more than mere loose conjecture, without sufficient premises really to warrant the conclusion. But crimes of the highest nature, more especially cases of murder, are established, and convictions and executions thereupon frequently take place for guilt most convincingly and conclusively proved, upon presumptive evidence only of the guilt of the party accused; and the well-being and security of society much depend upon the receiving and giving due effect to such proofs. The presumptions arising from these proofs should, no doubt, and most especially in crimes of great magnitude, be duly and carefully weighed. They stand only as proofs of the facts presumed till the contrary be proved, and those presumptions are either weaker or stronger according as

[*140]

† 12 How. St. Tr. 238, 254.

THE KING
v.
BURDETT.

the party has, or is reasonably to be supposed to have it in his power to produce other evidence to rebut or to weaken them, in case the fact so presumed be not true; and according as he does or does not produce such contrary evidence. It is established as a general rule of evidence, that in every case the *onus probandi* lies on the person who wishes to support his case by a particular fact, which lies more peculiarly within his own knowledge, or of which he is supposed to be cognizant. This, indeed, is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant of the crime with which he is charged; but when such proof has been given, it is a rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, unrebutted, or not weakened by contrary evidence, which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true. Bearing these considerations *in remembrance, there was, I think, evidence sufficient to be left to the jury from which they might reasonably presume a publication by the defendant in Leicestershire. In the case of *Sir Manasseh Lopez*, for bribing a voter of a borough in Cornwall; evidence was given that when he was at his seat in Devonshire he said, "such a one," (the person whom he was charged to have bribed, and whom he was proved to have bribed, though it did not appear whether the bribery was committed in the county of Devon,) "has been with me." It was objected at the trial, that there was not evidence sufficient to shew that the offence was committed in Devonshire. Upon that occasion I left it to the jury to consider whether his being there at the time, and that being the county in which the voter was to vote, were not sufficient; and upon that evidence the jury presumed the offence to have been committed in Devonshire; it being in the defendant's power, by means of the voter, who was, however, not called by him, to have shewn that the crime was committed out of Devonshire, if the fact had been so. I mentioned this circumstance to the Court afterwards, in order that it might be ascertained whether he was rightly convicted or not, and the Court thought it was *primâ facie* evidence, and he received judgment.

[*141]

The presumptions, in the present case, are stronger, and arise,

THE KING
v.
BURDETT.

as well from the contents of the libel, and the extrinsic facts proved, as from the want of contrary evidence within the knowledge and power of the defendant, as to facts peculiarly within his own knowledge, and of which he must be supposed to be cognizant, in order to rebut or weaken those presumptions against him. The contents of the libel shew, that it was written in haste, [*142] *and in Leicestershire, for the purpose of being speedily acted upon by public meetings elsewhere ; from which it is reasonably to be presumed to have been, as soon as effectually it might be, sent off for its destination, as it must have been delivered by Mr. Bickersteth to Mr. Brookes, in Middlesex, on the 24th August, or otherwise it could not have been published in the British Press on the 25th. The writer was living in Leicestershire, and was proved to be there on the 22nd and the day following, within which period of time it was, probably, sent away ; and it is but a reasonable presumption, that it was sent away by him from the place where he was then living ; at least it is so, in default of proof, on his part, of his being out of the county, or of any other evidence to rebut that presumption. The evidence for the Crown established both the time and person to whom the prosecutor had traced the libel. How it came to Mr. Brookes unsealed, and whether it was originally sealed or not, were matters peculiarly in the knowledge of the defendant, and not of the prosecutor. He knew how and in what state, whether open or sealed, and when he had sent or delivered it to Mr. Bickersteth, and might have proved it, or at least he might have shewn, by Mr. Bickersteth, in what state it was when he received it. Of these facts the prosecutor could not be supposed to be cognizant ; nor can it be supposed, if the letter had not been parted with by the defendant in Leicestershire, and even in an unsealed state, (for it does not appear, that is, there is no proof, that it went by the post ; and if it did, it would no doubt go sealed,) that Mr. Bickersteth would not have been called by the defendant to prove the state in which it was received by him. In default of all [*143] proof, under such circumstances, to weaken *or rebut these presumptions, I think the jury were warranted in concluding and finding that it was parted with by the defendant in Leicestershire, and that it was then in the same state in which it was delivered

THE KING
v.
BURDETT.

to Mr. Brookes, there being no proof, either direct or presumptive, of its ever having been in any other state. Indeed, my belief, from the evidence, would be, that it was not sent by the post to Mr. Bickersteth, and that he was not in London when he received it, but that probably, it was delivered to him by the defendant in Leicestershire; for I cannot suggest to myself any reason for his sending the libel, either by the post or otherwise, to Mr. Bickersteth, merely to give him the trouble of passing it to Mr. Brookes in the Strand, instead of sending it at once to Mr. Brookes himself.

But whether it was sent away or parted with by the defendant in Leicestershire, open or sealed, makes, in my opinion, no difference with respect to the question, whether it was, in point of law, published by him in that county or not, so far as to give the jury of that county jurisdiction over that fact. In 5 Co. Rep. 126a, it is laid down, that a scandalous libel may be published traditione, *when the libel, or any copy of it, is delivered over to scandalize the party.* So that the mere delivering over or parting with the libel with that intent, is deemed a publishing. It is an uttering of the libel, and that I take to be the sense in which the word “publishing” is used in law. Though in common parlance that word may be confined in its meaning to making the contents known to the public, yet its meaning is not so limited in law. The making of it known to an individual only is, indisputably, in law, a publishing. Dr GREY, Ch. J. in *Baldwin v. Elphinstone*, 2 Black. Rep. 1037, states, that a written libel may be published in a letter *to a third person, and states two instances from Rastal’s entries† of charges of constructive publications, by delivering letters to A. and B., and by fixing them on the door of St. Paul’s Church. The mere delivery or fixing them, with the intent to scandalize, is itself considered to be a publishing; and in prosecutions for libels, it is never made a matter of enquiry, whether either the witness, who purchased the libel at a defendant’s shop, or any other person, read it in the county where it was bought, or even at all, in order to prove the publication of it complete in that county. In such cases the fact of delivering it to the purchaser is alone

[*144]

† Action on case, 13 a.

THE KING
v.
BURDETT.

relied upon as proof of the publication in the county, without any proof of its being read there or elsewhere. In the prosecutions for libels in London, when proof was given of their being purchased at Carlile's shop, in Fleet Street, no enquiry, I believe, ever followed, whether the purchaser had read them within the city of London or not; though there is all probability he took them out of the city of London and delivered them unread to the solicitor of the Treasury, or some one else in Lincoln's Inn. The mere parting with a libel with such an intent, by which a defendant loses his power of control over it, is an uttering; and when the contents of it have thereby become known, if not before, it has become, I think, so far a criminal act, in the county where it is parted with, as to give the jury there a jurisdiction to try the crime of publishing it. As far as depends on the defendant, his crime is there complete; and the act of another person, in reading the composition elsewhere, does not alter his criminality, or the nature of his act, in the county where he parted with it with the criminal intent. In the cases of *wills and awards, they are constantly made and published, without the contents being made known, even to the witnesses in whose presence they are published. So that the making known the contents is not, in some cases at least, *ex vi termini* essential to the constitution of an act of publishing.

[*145]

With respect to the objection of the learned Judge's refusing to receive evidence of the truth of the facts alleged, or rather assumed in the libel, there is, I think, not the least doubt upon the point. Although the objection was made, it was not even attempted to be supported by argument at the trial. Whatever might be the result of a due enquiry into those facts elsewhere, it is clear that that was not the proper place or occasion for enquiring into them, nor would the writing be otherwise than, in law, a libel. It assumes, as true, a statement most highly calumnious on individuals, and on the Government, merely from a statement in a public newspaper, and without the knowledge, whether it were true or not, to any or to what extent, and indulges in the highest strain of invective, for the purpose of inflaming the public, and raising in their minds the greatest discontent, disaffection, and alarm. That is, in itself, a seditious

THE KING
v.
BURDETT.

libel, and the question for the jury was, whether what the defendant had written and published, with the intent stated in the information, was a libel or not, and not to what extent it was so; even supposing that the result of that enquiry would have been any palliation of the libel. With respect to the objections taken to the learned Judge's having given his opinion and directions to the jury, upon the question, whether the writing was a libel or not, it seems to me that he left it to them to consider, whether they would adopt his opinion in that *respect, or not; and he is expressly directed, by the statute of the 32nd of the late King, according to his discretion, to give his opinion and directions to the jury on the matter in issue, in like manner as in other criminal cases. And with respect to the objections to his summing up, I do not, upon an attentive consideration of it, find any reason to disagree with his observations in that respect. For these reasons, I think the rule for a new trial ought to be discharged.

[*146]

BAYLEY, J. :

In several of the points discussed in the course of the argument, I agree with the rest of the Court. I have not the least doubt that the evidence relative to the truth of the transactions, stated in the libel to have taken place at Manchester, was properly rejected. I take it to be clear law, that if a libel contain matters imputing to another a crime capable of being tried, you are not at liberty at the time of the trial of the libel, to give evidence of the truth of those imputations. And this is founded on a wise, wholesome, and merciful rule of law; for if a party has committed such an offence he ought to be brought to trial fairly, and without any prejudice previously raised in the minds of the public and the jury. The proper course, therefore, is to institute direct proceedings against him, and not to try the truth of his guilt or innocence behind his back, in a collateral issue to which he is no party. The present libel contains imputations of very high crimes, capable of being tried. It contains a statement that certain persons at Manchester had been guilty of murder, and the truth, therefore, of the libel could not be tried without inquiring whether at Manchester certain persons had or

THE KING had not committed murder. It appears, therefore, to me, that
 BURDETT evidence upon this point *was not admissible; and that the case
 [*147] of *Rex v. Horne* is distinguishable, on the ground that there was not in that case an imputation of any crime capable of being tried. In some cases, indeed, it is possible that the falsehood may be of the very essence of the libel. As for instance; suppose a paper were to state that A. was on a given day tried at a given place and convicted of perjury: if that be true, it may be no libel, but if false, it is from beginning to end calumnious, and may, no doubt, be the subject of a criminal prosecution. Possibly, therefore, in such a case, evidence of the truth of such a statement by the production of the record, might afford an answer to a prosecution for libel. I also entirely agree that the learned Judge did right in intimating to the jury his opinion on the question, whether this was or was not a libel, and in telling them that they were to take the law from him, unless they were satisfied he was wrong. The old rule of law is, *ad quæstionem juris respondent judices, ad quæstionem facti respondent juratores*; and I take it to be the bounden duty of the Judge to lay down the law as it strikes him, and that of the jury to accede to it, unless they have superior knowledge on the subject: and the direction in this case did not take away from the jury the power of acting on their own judgment. Besides, if the Judge be mistaken in his view of the law, his mistake may be set right by a motion for a new trial; but if the jury are wrong in their view of it, it is not so easy to rectify their mistake. Upon all these several points I agree with the rest of the Court.

But the difficulty which has pressed on my mind, and which,
 [*148] from the beginning of this argument to the conclusion, I have not been able to overcome, arises from *the direction of the learned Judge to the jury, as to the publication in the county of Leicester. This is, undoubtedly, a technical objection, and does not interfere with the merits of the case. But whether technical or not, it seems to me to be a valid objection; and I should desert my duty if I did not, by avowing my opinion, give to the defendant the full benefit which may arise from it, whatever that opinion may be. The facts proved at the trial were in substance these: the libel was written at Kirby Park, in Leicestershire;

THE KING
v.
BURDETT.

as appeared from the date, which is Kirby Park, the 22nd August, and from the circumstance of the defendant being seen on that and the subsequent day, riding near his residence in that county. By a subsequent letter to Lord Sidmouth, the defendant avowed himself the author, and that he had transmitted the paper to London. It appeared also, that on the 24th of August Mr. Brookes received it in London from Mr. Bickersteth, and that he received at the same time an envelope, in which the libel was contained, and in which was a direction from the defendant to Mr. Bickersteth, to pass the enclosure to Mr. Brookes. It did not appear whether the envelope had been sealed, and there was no evidence of the manner in which it had reached Mr. Bickersteth, whether by a personal delivery or otherwise; he himself was not called as a witness, nor was there any evidence to shew that he was resident or had been in Leicestershire about that time. An objection was taken at the trial, that there was no evidence of any publication in Leicestershire, which, after argument, the learned Judge overruled, and when he summed up to the jury, he intimated to them, that they might presume that the enclosed paper was delivered open to Mr. Bickersteth, in the county of Leicester. Now, my objection to *that direction is this, that the Judge left it to the jury without sufficient premises to warrant them in presuming an open delivery to Mr. Bickersteth; and that it proposed to their consideration no other species of delivery by the defendant. As far as I can judge, the evidence given furnished to them no ground for such a presumption. No one can doubt that presumptions may be made in criminal as well as in civil cases. It is constantly the practice to act upon them, and I apprehend that more than one half of the persons convicted of crimes, are convicted on presumptive evidence. If a theft has been committed, and shortly afterwards the property is found in the possession of a person who can give no account of it, it is presumed that he is the thief, and so, in other criminal cases; but the question always is, whether there are sufficient premises to warrant the presumption, and those premises seem to me, in this case, to be wanting. In order to warrant a presumption a *prima facie* case must, at least, be made out. Now was such a

[*149]

THE KING *primâ facie* case made out here? The proposition to be
BURDETT. established consists of two parts: first, that a paper written in
Leicestershire and afterwards found in London, in the hands of
Mr. Bickersteth, was delivered personally to him in Leicestershire;
and, secondly, that it was delivered to him open. It is incum-
bent on the prosecutor to make out a *primâ facie* case upon the
affirmative of each of those points. Now, does he advance any
evidence as to either? Does it follow, that because Mr. Bicker-
steth has it in London, that he received it personally in
Leicestershire? Does it follow, because he has it open in
London, that it was not sent to him in a parcel or in a sealed
letter? Suppose this to be the only proposition to be established,
[*150] and that *the prosecutor had gone with this evidence before a
grand jury, could the grand jury have found the bill? I apprehend they would have expected some additional facts to be
produced, and that unless Mr. Bickersteth had been called as a
witness on the part of the Crown, they would not have found a
bill on the publication in Leicestershire; they might have said,
“Here is clearly a publication in Middlesex, for which a bill will
no doubt be found by the grand jury of that county; but it
is altogether doubtful whether any publication took place in
Leicestershire or not.” Now, if a grand jury could not find a
bill upon such evidence, can the petit jury be asked to convict
upon it? Again, suppose a feigned issue upon these two
questions; could the plaintiff ask for a verdict upon such
evidence as this? Upon whom does the *onus probandi* lie? Is
the plaintiff to say to the jury, “If the defendant does not give
you any evidence you are to presume that this paper was
delivered to Mr. Bickersteth and open?” I apprehend, that if
he did say so, it would be impossible for the jury to come to
such a conclusion. I try this case by these tests, because,
although this is a criminal information filed by the *Attorney-
General*, yet he will not file an information in any particular
county, unless he is convinced that there is such evidence as
ought to satisfy a grand jury; and he never would, I apprehend,
have filed this information, unless he had thought that there
was a *primâ facie* case of publication in Leicestershire. I agree,
that where a matter is peculiarly within the knowledge of one

party, the *onus probandi* may be shifted, and his neglect to give the evidence may furnish ground for a presumption against him. But here the matter does not lie *peculiarly within the knowledge of the defendant. Mr. Bickersteth knew as well as the defendant the circumstances of the case, and the case on the part of the prosecution shews it. Then the question is, whether it was sufficient to leave the case without calling him as a witness. Is the prosecutor to say, "Here is a person who can tell you to an absolute certainty the fact as to the delivery, but I will not call him, and yet I will desire you to presume a personal and open delivery to him. I ask you to act upon presumption which may mislead, when the power of supplying you with certainty is within my reach." If, indeed, there was any evidence to go to the jury, they had a right to come to a conclusion. But my opinion is, that there was no evidence, and that it ought not to have been submitted to their consideration at all. My learned brother told the jury most properly, that if he were wrong in his view of the case, the defendant would have the benefit of having his mistake corrected. And it does seem to me upon a careful review of the case, that there was a mistake in considering that in the absence of Mr. Bickersteth, there was any evidence to go to the jury. If, in the course of the cause, it had appeared that Mr. Bickersteth had been in Leicestershire, or that the defendant or any of his agents had been instrumental in concealing from the prosecution the mode in which the paper had come to the hands of Mr. Brookes, it might, perhaps, have varied the case, and given some ground for such a presumption. But there is no such proof, nor even that any application to that effect was ever made to Mr. Brookes; it is not even shewn that Mr. Bickersteth was not present in court at the time of the trial, and capable of being examined as a witness. In the absence of all this proof, it seems to me that there was no ground on which the jury could *put the presumption either the one way or the other. If this case had gone before a grand jury, Mr. Brookes might have been compelled to say from whom he received the paper, and the link of the chain which seems at present wanting, might have been easily filled up. But it seems to me that as the case at present stands, the jury were desired to make a pre-

THE KING
v.
BURDETT.

[*151]

[*152]

THE KING
v.
BURDETT.

sumption without having sufficient premises, and that if they did draw that presumption they acted not upon justifiable inference, but upon unwarrantable conjecture. Upon these grounds the difficulty which I have entertained in this case is principally founded.

But it is said, that even if the verdict cannot be supported on this ground, yet there is evidence from which a jury might have presumed, and must have presumed, that this libel was delivered for the purpose of publication, either to a servant, or at the post office, in the county of Leicester. If the jury must have presumed that, I should pause before I said there ought to be a new trial. If it stands only that they might have done so, then it is for them to draw the conclusion. If the case has been put to them on a ground which cannot be supported, we must use great caution in proceeding upon the idea that there was another ground on which they might have acted. The jury ought never to invade the province of the Judge as to questions of law, but it is for them alone to come to a conclusion on questions of fact. If the Court draw the conclusion, they invade the province of the jury. Upon this evidence, I cannot tell where Sir Francis Burdett parted with the letter, what distance his residence is from the post office, into what post office it was put, and whether he carried it himself, or sent it by a servant. These are points on which I have no means of forming a judgment. It therefore

[*153]

*seems to me that there is no foundation on which without infringing on the rights and privileges of the jury, we could come to the conclusion, that although the paper was delivered to Mr. Brookes in London, it must have been parted with by Sir Francis Burdett in Leicestershire. That question has not been put to the jury, and till that has taken place, it is not for me to put such a construction upon the facts. But suppose that it was delivered by Sir Francis Burdett in Leicestershire; then the question arises, in what state was it delivered? Was it open or sealed? If sealed, does a close delivery amount in law to a publication? That turns on the meaning of the word "publication;" I do not mean to give an opinion whether a close delivery is or is not a publication, but I think, that if a Judge tells a jury that a close delivery, a mere *traditio*, in a sealed

THE KING
v.
BURDETT.

state (without an opportunity of seeing the contents) is a publication, a defendant should have the right to claim a special verdict on that point, in order that he may have the opinion of a court of error on the subject. The word "published," is equivocal, and may admit of different meanings according to the subject-matter to which it is applied. In the case of libel, which is criminal only in respect of its contents, it may mean only a communication to others, or an affording an opportunity to others of seeing the contents. There does not appear to me to be any authority so direct on this point as to take from the defendant the right to have a writ of error in order to canvass this question. Of the authority of Lord ELLENBOROUGH, nobody thinks higher than I do. He was a man of a most powerful and vigorous mind; but I may say, that even his opinions at Nisi Prius were not always right; and I will add of him, that I never met with a man who was more ready in the best *part of his life to recede from his own opinion so delivered, and to yield to that of others. The case of *The King v. Watson* did not give him such an opportunity. The evidence was of the post-mark at Islington, to shew a publication in Middlesex; the case subsequently failed, and the point was not afterwards considered. The case of *The King v. Williams* was for sending a challenge, and though the word "publication" was used, yet the act charged was an act of sending, and no doubt the putting a letter into the post was proof of that fact. There was another case of *Metcalf v. Markham*, cited in argument, which, however, seems to me to be no authority on this point, because there the sending the letter from Hull, was clearly part of the cause of action, and material evidence in the case. Another case to which I adverted in the course of the argument, is that of *The King v. Collicott*; there the prisoner was indicted for uttering forged stamps in Middlesex, a crime which has been considered as analogous to the present case. He lived in Middlesex, and sent the forged stamps by his servant in a parcel to London, that they might be forwarded from thence by a carrier to Bath; the Judges considered the question, and seven were of opinion that he was guilty of uttering in Middlesex, but five others, whose names were entitled to great respect, very considerable lawyers, were of a contrary

[*154]

THE KING
v.
BURDETT.

[*155]

opinion. The result was, as might be expected, that no proceedings were taken on the verdict; but he was afterwards prosecuted for another offence in London. These authorities seem to warrant me in this observation, that the case of delivering a letter sealed, is not so clear a case of publication as to exclude a defendant from the right to have the fact found specially; and it seems to me, that *by the course taken, the defendant has been deprived of this opportunity, for the question of a delivery sealed, never was presented for the consideration of the jury.

But it has further been argued, that whether there was a publication in Leicestershire or not, still this verdict ought to stand, for that the composing, writing, and publishing, constitute one entire offence, and that if part thereof be in one county and part in another, an indictment may be supported in either; and I was for a considerable time of that opinion, and had at one period consented, upon that ground, to refuse the rule. Upon the discussion, however, which has since taken place, and upon further consideration, I am by no means satisfied that this is so clear a point as to warrant us in concluding the defendant from having it put upon the record. I consider the evidence as establishing clearly that the defendant composed and wrote in the county of Leicester, and published in the county of Middlesex; and I think it impossible to deny but that he composed, wrote, and published with the intent charged in the information. And even now, if the *Attorney-General* would consent to enter the verdict specially in that way, I should be against the rule for a new trial. Upon the best consideration, however, which I can give to the authorities, I am of opinion that the whole offence, the whole *corpus delicti*, must be in one and the same county; that there is no distinction in this respect between felonies and misdemeanours; and that, though the jury may enquire into collateral facts, or facts of inducement prior to the crime, or facts resulting from the crime, in another county, they are wholly confined to the county for what constitutes the offence itself. Hale's Summary, p. 208, says, "Regularly the grand jury can

[*156]

*enquire of nothing but what arises within the body of the county for which they are returned;" but he states as an exception,

THE KING
v.
BURDETT.

“for a nuisance in one county to another, a jury of the county where the nuisance is committed may indict it.” Now this mode of putting the case of nuisance clearly implies that the rule extended to misdemeanours as well as felonies, and that such special case of misdemeanour was an exception to it. And why is it an exception? Because the whole body of the offence is in the county where the nuisance is committed; the jury there find in their own county a wrongful act, calculated to do mischief; and all they enquire out of their own county is into the consequences of such wrongful act. Lord HALE says,† “The grand jury are sworn *ad inquirendum pro corpore comitatus*; and, therefore, regularly they cannot enquire of a fact done out of their county, for which they are sworn, unless specially enabled by Act of Parliament, but only in some special cases;” and in p. 164 he says, “If A. by reason of the tenure of lands in the county of B., be bound to repair a bridge in the county of C., he may be indicted in the county of C.” Now this, again, is a special exception in case of misdemeanour. The whole *corpus delicti* there is the neglect to repair, which is in C., and the ground of his obligation is only evidence to prove his guilt in C. Lord HALE cites 5 Hen. VII. 3, and 3 Ed. III. Assize 440,§ in support of this position. In 2 Hawk. c. 25, s. 34, it is stated thus: “It seems to be generally agreed at this day, that by the common law no grand jurors can indict any offence whatsoever, which does not arise within the limits of the precinct for which they are returned.” And in s. 37: “And *it seems, by the common law, if a fact done in one county prove a nuisance to another, it may be indicted in either county,” still putting this (though a case of misdemeanour) as a case of special exception; for which he cites Summ. 203, Assize 446, and 19 Assize, 6. Sir W. Blackstone, vol. 4, p. 302, lays it down thus: “The grand jury are sworn to enquire only for the body of the county, *pro corpore comitatus*; and, therefore, they cannot regularly enquire of a fact done out of the county for which they are sworn, unless particularly enabled by Act of Parliament.” And in page 305, after an enumeration of certain exceptions, he says, “But in general, all offences must be indicted, as well as tried, in the

[*157]

† 2 Hale, P. C. 163.

THE KING ^{v.} county where the fact is committed." These authorities are all
 BURDETT. general, without distinction between felonies and misdemeanours, and seem to shew, that though the evidence need not be confined to the county, the offence must. We have an instance of this in the case of bigamy, where the first marriage, which must be proved, may be proved to have taken place either in or out of the county where the offence is tried. But what is the whole offence? It is the second marriage, and the second marriage only which is the *corpus delicti*, and that must be proved within the county, (unless the indictment is in the county where the prisoner was apprehended, which is specially provided for,) and then the jury have jurisdiction to enquire into the other facts of the case. *Danby's case*, 2 Rich. III. pl. 10, which has been cited, seems to me to fall within the same rule. There it appeared that the original writ was erased in London by Mundres, but the other erasures which completed the offence, were done in Middlesex, by Danby and three others. And the prisoners, in consequence of this, were not tried for the felony, but were afterwards separately convicted in London and *Middlesex of the misdemeanour. But there each alteration was a complete common law misdemeanour; each offender was indicted in the county in which the whole of his misdemeanour was committed, and this case, therefore, is not an authority to shew that a misdemeanour commenced in London and consummated in Middlesex, could be tried in either.

[*158]

Upon these grounds, I think, this, at least, so far a questionable point, that if the publication in Leicestershire cannot be supported, the ground which I have last considered is not sufficient to support the verdict in its present shape, and that there ought to be a new trial, unless the *Attorney-General* consents to a special verdict. The only remaining question is, whether, if the verdict be narrowed to the composing and writing, and the publishing and causing to be published be negatived, composing and writing constitute an offence. But the case seems hardly ripe for discussing that question. If the verdict be so narrowed, I shall readily give my opinion upon the question; but, till then, it is unnecessary. Upon the whole, therefore, I am of opinion that the verdict, as at present found, ought not to stand; and that, if it is not confined to composing and writing in Leicester-

shire, and publishing in Middlesex, there ought to be a new trial.

THE KING
v.
BURDETT.

ABBOTT, Ch. J.:

I am of opinion, that the rule for a new trial in this cause ought to be discharged. The case has been argued at very great length on the part of the defendant, and many topics have been addressed to the Court, some of a general nature, and others more particularly applicable to the case itself. It has been contended, that the whole crime of libel consists in the publication alone, and that the author, or writer, is in *no degree criminal if his composition be not published. I intimated more than once, in the progress of the argument, that the decision of this point was, in my opinion, immaterial to the present case, because this is the case of a libel actually published by the authority and procurement of its author. I shall, therefore, abstain from giving any decided opinion upon this point, but I cannot forbear observing, that many of the passages quoted in support of the proposition, from the text of the civil law being expressed in the disjunctive, appear to me to be authorities rather against than in favour of the point for which they were adduced. The composition of a treasonable paper intended for publication has, on more than one occasion, been held an overt act of high treason, although the actual publication had been intercepted or prevented, and I have heard nothing upon the present occasion to convince my mind that one who composes or writes a libel with intent to defame, may not, under any circumstances, be punished, if the libel be not published. In any case in which this question may arise, the particular circumstances of the case will become fit matter for consideration at the trial.

[*159]

The case of *The King v. Beare* came before the Court after verdict. There is no very clear and satisfactory report of it, and I will only say of it, at present, that I have no doubt that Lord HOLR considered the criminal intention charged in the indictment as not negatived by the verdict, and understood the word “only” to be confined to the acts done. It is true, that in cases of libel a publication has been generally proved, and the trial has been had in the county where publication took place. The place of

THE KING
v.
BURDETT.
[*160]

publication is rarely a matter of doubt, the place of the writing or composition is often unknown, and as most of the cases of libel have been cases of publication, *Judges and other persons, speaking of the crime of libel, generally, and without any thing requiring a distinction between the writing and publishing, may not unreasonably use expressions applicable to published slander.

It was further contended, that the word "publication" denotes an actual communication of the contents of the writing by the publisher to some other person, and we were referred to dictionaries for the sense of the word "publication." But in the law, as indeed in other sciences and arts, some words are used in a peculiar sense, differing in a certain degree from their popular meaning. Thus, in the language of the law, we speak of the publication of a will, and the publication of an award, without meaning to denote by that word any communication of the contents of those instruments, and meaning only a declaration by the testator or arbitrator, in the presence of witnesses, that the instrument is his testament or award. In like manner the publication of a libel does not, in my opinion, mean an actual communication of the contents of the paper. Lord COKE says, a libel may be published *traditione*, by delivery; and this is adopted by Lord Chief Baron COMYNS in his Digest, and is conformable to the civil law, wherein we find the word *edidit* used as applicable to this subject. Actual communication of the contents, as by singing or reading, is indeed one mode of publication; but it is not the only mode, nor the usual mode; the usual mode is by delivery of the paper, either by way of sale or otherwise; and upon proof of the purchase of a newspaper or pamphlet in Fleet Street, no one ever thought of asking whether the purchaser or other person read the paper or pamphlet in London or elsewhere.

[161]

I shall now proceed to advert to the topics more particularly applicable to the present case. In the first place it was contended, that there was not, in this case, as it was said there ought to have been, any evidence of publication in the county of Leicester; and the manner in which this point was put to the jury, by my learned brother, at the trial, was made the ground

THE KING
v.
BURDETT.

of much objection. It was said, that the jury were directed to presume a publication in Leicestershire, without any sufficient ground ; but, upon an attentive consideration, I am of opinion that all that was done upon this subject was well warranted by the evidence adduced at the trial. A presumption of any fact is, properly, an inferring of that fact from other facts that are known ; it is an act of reasoning ; and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference ; but if no fact could thus be ascertained, by inference in a court of law, very few offenders could be brought to punishment. In a great portion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime, is or can be given ; the man who is charged with theft, is rarely seen to break the house or take the goods ; and, in cases of murder, it rarely happens that the eye of any witness sees the fatal blow struck or the poisonous ingredients poured into the cup. In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against *him, in the absence of explanation or contradiction ; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction ; can human reason do otherwise than adopt the conclusion to which the proof tends ? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily ; but in matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected ; and it is one of the peculiar advantages of our jurisprudence, that the conclusion is to be drawn by the unanimous judgment and conscience of twelve men, conversant with the affairs and business of life, and who know that, where reasonable doubt is entertained, it is their duty to acquit ; and not of one or more lawyers, whose habits might be suspected of leading them to the

[*162]

THE KING
v.
BURDETT.

[*163]

indulgence of too much subtilty and refinement. I have thought it right to premise these general observations, before I consider the particulars of the evidence in the present case, and I must also first take notice of a topic that was urged on this head, by one or more of the learned gentlemen who have argued for the defendant. It was said, and truly said, that guilt and crime are never to be presumed; and the cases of supposed murder, mentioned by Lord HALE, and which have since operated as a caution to all Judges, were quoted on this occasion. But the cases are wholly different. In those cases, there was no actual proof of the death of the person supposed to have been slain, and, consequently, no proof that the crime of murder had been committed. The *corpus delicti* was *not established. In this case, the crime, so far as it consists in the composing and publishing the paper, was proved beyond all contradiction; the paper was written by the defendant, and came to the hands of Mr. Brookes by the defendant's authority and procurement, not as a private and confidential communication, but for insertion in the public newspapers; and the question is not whether there was any publication, but in what county the publication shall be deemed to have taken place; a question arising entirely out of the locality of the jurisprudence of this country. If the prosecutor has mistaken the county in which the offence is charged, the defendant is entitled to avail himself of that mistake; and I have as little inclination as authority to deprive him of his privilege; and this brings me to the particulars of the evidence.

The information is laid in Leicestershire, and it charges that the defendant, in Leicestershire, composed, wrote, and published, and caused and procured to be composed, written, and published, a libellous paper. In support of this allegation, a paper was produced at the trial, in the hand-writing of the defendant, dated the 22nd of August, at Kirby Park; a letter was also produced, written by the defendant to Lord Sidmouth, in which the defendant acknowledged that he was the author of this paper, and had transmitted it to town for insertion in the newspapers. Kirby Park is a mansion-house and residence of the defendant, a gentleman of fortune, in Leicestershire; the defendant was seen riding on horseback, in Leicestershire, on the 22nd of August,

and also on the following day. From the contents of the paper, it appears to have been composed in some haste, in consequence of something which the defendant had just read in a newspaper. There is, therefore, *abundant proof, that the matter was composed and written by the defendant, in Leicestershire; nor is that fact denied; and if so, the paper must have been in his hands or power in Leicestershire, when the writing was finished. It was further proved, that on the 23rd or 24th of August this paper was delivered to Mr. Brookes, in Middlesex. Mr. Brookes, a friend of the defendant, was the witness who proved this; and the further account that he gave of the matter was, that the paper was brought to him by a Mr. Bickersteth, in an envelope, which he had mislaid, and which had no seal; he did not know how it was directed, but he believed that it might be directed to Mr. Bickersteth; and he said that it had the words "Pass this to Mr. Brookes," or something to that import. It is to be observed, that this witness would not take upon himself to say that the envelope was directed: he only said he believed it might be; nor did he say whether the words were written within or without the envelope. Mr. Bickersteth was not called by the prosecutor or by the defendant; but it appeared, from the testimony of Mr. Brookes, that the prosecutor did not, before the trial, know that the paper had ever been in the hands of Mr. Bickersteth, for Mr. Brookes declined, at the trial, to name the person from whom he had received the paper, until he was told that he must do so.

The defendant, on the contrary, knew how and in what manner he had parted with the paper; he knew that his trial was to take place in Leicestershire, and he came to the trial ready to object to the county. Upon these facts the question arises, whether the jury might reasonably infer and conclude, in order to satisfy the locality of jurisdiction, that the paper had passed from *the defendant in the unsealed envelope to Mr. Bickersteth, in Leicestershire, as the Judge informed them they might, in his opinion, do. The learned counsel for the defendant had argued with much ability at the trial, in the hearing of the jury, that the evidence furnished nothing upon which any inference could be drawn of a publication of any kind in the county

THE KING
v.
BURDETT.

[*164]

[*165]

THE KING
v.
BURDETT.

of Leicester ; the jury had witnessed the examination of Mr. Brookes, who was the agent for the defendant, for transmitting the manuscript to the editors of the public newspapers ; this agency is acknowledged by the defendant in his letter to Lord Sidmouth. I have considered this question again and again, and with much anxiety, from respect to the different opinion entertained on this point by my brother BAYLEY, and I must say, that in my opinion the premises warranted a conclusion that the paper had been delivered by the defendant in Leicestershire to Mr. Bickersteth, in the state in which the latter gentleman delivered it to Mr. Brookes. The learned counsel have contended, that for any thing that appeared, the paper might have been sealed by the defendant before it quitted Leicestershire ; that the defendant might himself have carried it out of Leicestershire, and delivered it in some other county to Mr. Bickersteth, or to some other person, or might himself have put it into some post office out of Leicestershire. Now Mr. Bickersteth might have proved for the defendant in what state and at what place, and in what manner he had received the paper, but he was not called ; and as I have before observed, this was a question which the defendant came prepared to try, so that there was no surprise. The defendant was a member of Parliament ; he might have sent this paper free of postage, directly to Mr. Brookes, and there *was no apparent reason for his sending it by the post, or otherwise to Mr. Bickersteth, in London, to give him, (a professional gentleman, as he is described to be, but whose place of residence does not appear,) the trouble of taking it in person to Mr. Brookes. The paper professes to have been written in haste, and it appears to have been intended for an immediate publication in the newspapers. It is dated on the 22nd, and appeared in at least one morning paper on the 25th. Mr. Brookes said he did not recollect on what day, nor indeed at what time in August he had received the paper ; he said he copied and sent it to the newspapers ; this must have occupied some little time. It cannot have been delivered to Mr. Brookes later than the 24th ; at what time it was finished on the 22nd does not appear ; the distance of Kirby Park from the Strand is, I suppose, not less than a hundred miles, but that matter would be better

[*166]

THE KING
v.
BURDETT.

known to the jury than to me. The defendant was proved to have been in Leicestershire on the 22nd and 23rd. To have presumed that he had himself gone out of the county to deliver this paper, for no reason apparent or suggested; or that a paper delivered by a private hand unsealed, and not appearing to have been sent by any conveyance requiring a seal, was in fact sealed before it was dispatched or was sent by any other hand or conveyance, than the hand that delivered it, would, indeed, in my opinion, be to draw a conclusion without any premises to warrant it. It certainly would be to introduce by way of presumption, some new and affirmative matter of fact not found in the evidence, but of which, if really existing, the evidence was in the knowledge and power of the defendant. Then why, in the absence of all the explanation and proof that the *nature of the case afforded of a delivery out of the county or in a sealed cover, or to another person, if the fact was really such, might not the jury reasonably decline to presume any of those facts, and conclude, from the proof before them, that the defendant had delivered the paper to Mr. Bickersteth, in that county in which alone the defendant was proved to have been, and in that state in which alone the paper ever appeared to have been? I can discover no reason why that conclusion might not be drawn; on the contrary, I think it might reasonably be drawn as a legitimate conclusion from the proof given, in the absence of all contradiction.

[*167]

It is not necessary, to sustain the verdict on this point, that this should be the only conclusion that could be drawn from the premises. Matters of fact are for the determination of the jury; if they draw a conclusion not warranted by the premises before them, it is our duty to correct their error, and to send the case to another trial; but if the conclusion is a reasonable inference from the premises, we ought not to disturb their verdict. I think this conclusion the most reasonable inference from the premises, and that the Judge was perfectly justified in presenting the matter to the jury for their consideration, in this light, with a strong expression of his own opinion in favour of this conclusion.

I have given my opinion thus largely on this point, on account

THE KING
v.
BURDETT.

[*168]

of the great importance that has been attached to it in the course of this cause, and this being my opinion, I might forbear to advert to another topic that has been addressed to us, but I think it right to advert to, and give my judgment on that matter, not *only on account of its general importance, but because the particular point on which so much has been said, and to which I have already adverted, would, but for an observation made by my learned brother to the jury at the trial, be in my own opinion of little importance on the question properly brought before us, which is, whether there ought to be a new trial. By presenting the matter to the jury, in the mode adopted by my learned brother at the trial, the cause was put as to the point of publication, on an issue much more favourable to the defendant, and giving him a much greater chance of acquittal *pro tanto* at least, than the law required. For I am most clearly of opinion, that upon the facts proved, and the inference necessarily arising out of them, and also that upon the facts taken simply by themselves, and without deducing any other fact by way of inference from them, and leaving, therefore, as to this part of the case, nothing to be found by the jury that is not already established, the defendant might lawfully be tried, and ought to have been found guilty of the whole charge contained in this information in the county of Leicester. And I cannot persuade myself to think that the Court would be justified in granting a new trial for the purpose of having certain facts specially found, and put upon the record, if the Court be convinced, as I in my judgment and conscience am convinced, that upon the facts so found, the Court would be bound to pronounce the defendant guilty, especially in a case wherein that was not asked at the trial. What are the facts? The defendant wrote the libel at his own mansion-house in Leicestershire on the 22nd of August; he was seen in Leicestershire riding on horseback on that day, and also on the following day; the *paper was delivered to Mr. Brookes, in London, by a third person on the 23rd, or at the latest on the 24th August, and this by the authority and procurement of the defendant, for insertion in some London newspapers. Upon these facts, can any man hesitate to infer that the defendant in some way delivered the paper out of his custody in Leicester-

[*169]

THE KING
v.
BURDETT.

shire that it might pass to London? And if he did there deliver it for that purpose, such a delivery was at the least a commencement in Leicestershire, of the *traditio* or act of publication. Now the fact of such a delivery in Leicestershire can scarcely be called an inference, for it is nothing more than saying that the defendant did the act in the county in which he is proved to have been on the day on which he did it, he not appearing to have been out of the county on that day, and the act being such as, regard being had to his rank and situation in life, would in the ordinary course of things take place at his own house.

But it is said to be possible that he may have carried the paper out of the county in his pocket, and have parted with it in some other county; and much has been said in the argument about the vicinity of Kirby Park to the borders of some other county. I presume the distance is not very great, and some of the jury would probably be acquainted with it. I admit the possibility of the fact suggested, its probability I utterly deny. But if I should even go further, and having first converted the possible into the probable, should then take another step in this process of presumption, and assume the supposed probable to be the real fact, and thus at length conclude, that the defendant did carry the paper out of Leicestershire in his pocket, and deliver it from his hands in some other county, to be forwarded to *Mr. Brookes, I should still be bound to say, that the defendant might lawfully be tried, and ought to have been convicted of the whole of this charge in the county of Leicester. The commencement of the *traditio* or delivery would still be in Leicestershire, by the act of the defendant himself carrying the paper from his house into that county, in its progress to Mr. Brookes. To write and publish a libel is a misdemeanour compounded of distinct parts, each of which parts (for I am speaking of a published libel) being an act done in prosecution of one and the same criminal intention, is a misdemeanour. And where a misdemeanour consists of such distinct parts, I say, without doubt or hesitation, that the whole may be tried in that county wherein any part can be proved to have been done. All that I have heard from the learned gentlemen who have argued the case on the part of the defendant, and have presented this matter to the Court in every

[*170]

THE KING
BURDETT.

various view that ingenuity could devise, has not for one instant raised a particle of doubt in my mind; and having no doubt, I should abandon the duty of my office if I did not declare my own conviction, and act judicially upon it.

[171.]

If the law should be otherwise, I know not very well what consequence is to follow. At one time it was argued, that the trial could be in that county alone wherein the paper was received and read, which was called the place of the publication. If this be true, one of two consequences must follow, either the party must be convicted of the whole offence in the latter county, and then the jury of that county will inquire into, and find criminal matter committed in another, which would be contrary to other parts of the argument addressed to us, or the party must be acquitted of the writing; and if *the latter alternative be correct, then an author can never be punished as such if he happen to write at one side of Temple Bar and publish at the other. At another time it was contended, that in the case supposed, the party could not be tried in either county, or in other words, that he could not be tried at all; and if it be true that a misdemeanour can be tried in that county alone wherein every part of it has been committed, the impossibility of any trial in the supposed case would be a conclusion fairly deducible from the premises. But the conclusion would be an absurdity in the law, and the absurdity of the conclusion proves the falsehood of the premises.

Felony stands on a very different ground from misdemeanour; and the assertion that a misdemeanour can be tried in that county alone wherein every part of it was committed, appears to me to have been built upon a mistake of the true ground and reason of the doctrine in felony. This mistake, however, is not new, and therefore in no degree surprising, for we find in many of our books, and even in the preamble of the statute of the 2 & 3 Ed. VI. c. 24, expressions importing that a jury of one county cannot inquire into, or take cognizance of any fact that happened in another. It was admitted on the present argument, that the generality of these expressions must be so far restrained as to confine their import to criminal matter, or rather to a part of the crime, because daily experience shews,

that the proof of introductory or explanatory matter occurring in either county, is received without objection, even in cases of felony. There was a time, however, when it was supposed that a jury could not even in a civil action *inquire into a matter that did not take place in their own county. In the time of Henry the Seventh, an action of debt was brought upon a bond. The condition of the bond, according to the report in one part of the Year Book, was, that if a certain ship should sail to Lynn, and from thence go to Norway, and return from Norway to London, then the bond should be void; otherwise, that it should stand good. Now, upon this it was said, that as Norway was a place *ultra mare*, no jury in England could try or know whether the ship had been in Norway; that the fact upon which the condition depended was, therefore, a matter not triable; and a condition containing matter not triable was the same as a void condition, and that where the condition of a bond was void, it was the same thing as if the bond was made without any condition, and so the bond must stand good and be available as a single bond; and there is much learned and subtle reasoning upon those points, on one side and on the other, and the case was adjourned. So easy is it for men to perplex themselves, and even to deduce absurd conclusions, if once a false proposition be admitted as true. The case occurs afterwards in another part of the book in the following year, and there the condition is differently stated, but still, in such a way to make the return from Norway material. It appears not to have been decided at that time, and I have not traced the final result. (10 Hen. VII. fo. 22. 11 Hen. VII. fo. 16.)

THE KING
v.
BURDETT.

[*172]

The true ground of the doctrine in felony is this: if a felony be compounded of two distinct acts, one of which takes place in one county, and the other in another county, the concurrence of both being necessary to constitute the felony, the party may not be triable in *either, because, *ex hypothesi*, there is no felony committed in either. The case of a stroke in one county and death in another, was considered by some as of this kind. The stroke was not a felonious act at the time; and the death, though consequential to the act of the striker, seems not to have been considered by them as properly his act, and to remedy this

[*173]

THE KING
v.
BURDETT.

inconvenience, the statute 2 & 3 Ed. VI. c. 24, was passed. It seems somewhat extraordinary that the preamble of this part of the statute should be expressed in the terms in which we find it, because† Lord HALE mentions this point as being doubtful at the common law, and says the more common opinion was that the party might be indicted where the stroke was given, and in the same page there is a reference to *Coles's* case, Plowden, 401, to shew that a general pardon, whereby all misdemeanours are pardoned, intervening between the mortal stroke and the death of the party stricken, doth pardon the felony consequentially, because the act that is the offence, is pardoned, though it be not a felony until the party die.

[*174]

Observations of the same kind may be made upon the case of accessories in one county, whether before or after the fact, to a felony committed in another county. The act done, whether of prior advice or procurement, or of subsequent receipt and harbouring, is not a felonious act, if taken singly and by itself; but requires the concurrence of some other act, to give the felonious character. Both descriptions are provided for by the same statute, though the preamble speaks only of accessories after the fact; and the case of accessories before the fact does not seem to have been very clearly settled at the common law, for according to a case in *Keilwey*, p. 67, *it appears that accessories before the fact, in one county, to a murder committed in another, might be arraigned and tried in the county where the murder was committed. In the Year Book, 9 Ed. IV. pl. 48, there is a case of a person indicted in Middlesex, for there procuring one I. S. to commit a murder, who committed it in Berks; and because the accessory could not be arraigned until the principal was attainted or acquitted, the Court wrote to the justices and coroners of Berks to certify whether I. S. was indicted for the murder, and upon a return that he was not, the accessory was discharged. Now, it was wholly unnecessary to obtain such a certificate, and the party ought to have been discharged immediately, if the indictment against him in Middlesex could not be sustained, in case the principal had been convicted in Berkshire. In the case of the

† 1 P. C. 426.

THE KING
v.
BURDETT.

appeal of robbery reported in Dyer, fol. 38, it appears to have been the opinion of one, if not both the Judges present, that the procurer of a felony might be indicted in the county where his procurement was. But in that case an appeal of robbery brought in Wiltshire, where the robbery was committed, against the procurers thereof in London, was quashed; for, says Lord COKE, in *Bulwer's* case, 7 Coke, 2 b, who there cites this case of the appeal from Dyer, "in case of felony, which concerns the life of a man, every act shall be tried in the proper county where the act was in truth done." This case of life, though, perhaps, not a good logical reason for a distinction, is, undoubtedly, a ground for the utmost caution, and is well known to have operated strongly upon the minds of Judges in all times. It has, indeed, led in some cases to such subtilty and refinement of construction, and to the giving way to such nice and formal objections, as were in the opinion *of Lord HALE a reproach to the law. [*175] But as the reasons which may be assigned in cases of felony do not apply to other cases, so neither has any instance been found wherein a misdemeanour, composed of acts in different counties, each act being in itself a misdemeanour, has not been held wholly triable in that county wherein any criminal part was committed. The case of the *Seven Bishops*† which was referred to in the motion, does not establish any thing of this kind; for in that case, which was an indictment in Middlesex, there was not at any period of the trial any proof of the writing in Middlesex, nor, for a very long period, any proof of a publication in Middlesex. And the difficulty as to the locality of trial, was in the end so far removed as to become a question for the jury, under circumstances to which I need not now advert, by the testimony of the Lord President of the Council. And even after his testimony, the identity of the paper was to be collected by inference, which was not objected to. The doctrine of Lord COKE in 3 Institute, page 80, in his commentary on the statute 4 Jas. I. cap. 8, was applied to the case of felony. I will now refer to *Bulwer's* case, and the authorities there cited, premising only that I am not aware of any authority pointing to a distinction between local actions and indictments for misdemeanours. The power of the jury appears, upon principle, to be not less limited in the

† 12 How. St. Tr. 238, 254.

THE KING
v.
BURDETT.

[*176]

one case than in the other. *Bulwer's* case was an action brought in the county of Norfolk, for maliciously causing the plaintiff to be outlawed in London, upon process sued out of a court at Westminster, and causing him to be imprisoned in Norfolk upon a *capias utlagatum* directed to the sheriff of that county, but issued at Westminster. It was *objected that the action was not maintainable in the county of Norfolk, but the contrary was decided, because where matter in one county is depending upon matter in another county, the plaintiff may choose in which county he will bring his action, unless the defendant should be prejudiced in his trial. And of this proposition numerous instances are there cited relating to actions, some of which were then considered as local, though, perhaps, they might not be so now, and others which would still be so considered. Among the instances, are conspiracy in one county to indict a man falsely, followed up by an indictment preferred by the same parties in another county; neglect to repair a wall in Essex, whereby the plaintiff's land in Middlesex is overflown; and the forgery of a deed in one county, and publication of it in another. This last instance exactly resembles the writing of a libel in one county, and publication of it in another, and is less strong than the writing in one county, and sending or carrying from thence into another, in order that it may be received and read. For the sending or carrying in the latter case, is the commencement of the publication; the receipt and reading are its consummation; the sending is the act of the party, and so also is the carrying of it, if it be carried by the writer; and the *melior notitia* that has been alluded to, seems to be, as it regards such a party, in the county in which his own acts are done.

[*177]

A very early instance of misdemeanour, wherein the whole matter was enquired into in one county, is *Danby's* case in 2 Rich. III. fo. 10, cited in 1st Pleas of the Crown, fo. 652. The proceedings, to an outlawry, consisting of an original writ, three writs of *capias*, and a writ of exigent, had been altered, by the erasure of *the christian name of the defendant, who was therein called John, and the substitution of William in its place. This alteration in the original writ was made by one person, in London, and in the several other writs, by three other persons,

in Middlesex. The whole matter, taken together, was considered as a felony, under the statute of 8 Hen. VI. c. 12. It seems that the several writs were considered as constituting but one record; and this offence, thus committed in parts, was held not to be triable as a felony; but it was held, that the one offender might be tried in London and the others in Middlesex for the misprision, which was accordingly done, and they were punished; and though it may be true, as was said by one of the learned counsel, that the whole act of the person tried in London was committed there, yet it seems to have been thought necessary to prove all that had occurred in Middlesex. A part, viz. the issuing of the writ, was certainly necessary, but this was no criminal part; and the case is not so material in itself, as for the observations made upon it by Lord HALE. "And yet observe," saith he, "the felony was one entire felony, committed in two counties, and so neither enquirable nor determinable in one county; for the jury of that county cannot take notice of part of the fact committed in another; and yet the misprision of that felony was enquirable and punishable in either county, where but part of the felony was committed; and yet the jury, in that case, must take notice of the entire felony, part whereof was committed in another county." The expression "misprision of felony," does not seem to be very correctly used in this case; for misprision of felony is the concealment of a felony, *knowing it to have been committed by another. This was the case of acts done by the parties themselves.

THE KING
v.
BURDETT.

[*178]

In the case of *The King v. Williams*, in 2 Campbell, 506,† which is reported to have been an indictment in Middlesex, for sending, but was, in fact (as appears by the record), an indictment for composing and writing, and causing to be composed and written, and sending and delivering, and causing to be sent and delivered, a libellous letter, with intent to provoke a challenge; the letter being sealed up, was put into the post-office, by the defendant, in Westminster, addressed to the prosecutor in London, who received it there. Objection being taken, that there was not any evidence of an offence committed in Middlesex, Lord ELLENBOROUGH said there was a sufficient publication in Middlesex, by putting the letter into the post-office there, with

† 11 R. R. 781.

THE KING
v.
 BURDETT.

[*179]

intent that it should be delivered to the prosecutor elsewhere. In the case of *The King v. Watson*, 1 Campbell, 215, the prosecutor failed in proving that the first letter was put into the post-office in Middlesex, and it was received in another county. GROSE, J. in delivering the judgment of the Court, in *The King v. Brisac* and another, 4 East, 171,† says, “There seems no reason why the crime of conspiracy, amounting only to a misdemeanour, may not be tried, wherever one distinct overt act of conspiracy is, in fact, committed, as well as the crime of treason. In *The King v. Bowes* and others, the trial proceeded upon this principle; where no proof of actual conspiracy, embracing all the several conspirators, was attempted to be given, in Middlesex, where the trial took place, and where the individual actings of some of the conspirators were wholly confined to other *counties than Middlesex; but still the conspiracy, as against all, having been proved, from the community of criminal purpose, and by their joint co-operation in forwarding the objects of it in different places and counties; the locality required for the purpose of trial, was holden to be satisfied by overt acts done by some of them, in prosecution of the conspiracy in the county where the trial was had.” Another instance of this kind, is the decision of the Judges in the case of *The King v. Buttery*; he was indicted on the statute of 30 Geo. II. c. 24, s. 1, for obtaining money by false pretences. The language of the statute makes the offence to consist in obtaining the money, and not in using any false pretence, whereby money shall be obtained. The indictment was in Herefordshire, the false pretence was in Herefordshire; but the money was received in Monmouthshire; the Judges thought the indictment was laid in the wrong county; they did not think the party not indictable at all, which they ought to have done, if the proposition addressed to us be true, because the pretence which was necessary to constitute the crime was in one county and the receipt in another; and so there was no entire crime in either. The instances of treason which were alluded to by GROSE, J. are well known; see 1 East's Pleas of the Crown, 180, and they go this length, viz.; that one witness to an overt act in the county wherein the indictment is preferred, is sufficient, if another overt act in another county be proved by another witness; and so, as there

† 7 R. R. 557.

can be no conviction, but by the testimony of two witnesses, the jury must take cognizance of criminal matter committed out of their county, as the foundation of a conviction; and treason and misdemeanour are alike distinguishable from *felony, on the ground that I have already mentioned, viz. that each act is an offence of the same species with every other and with the whole; whereas an act requiring the concurrence of some other act or matter, to constitute a felony, may not be in itself a felony, and may either be an offence of a different nature, punishable as such, or lose its character by merger in the other act or matter, so as to become dispensable, for want of the locality necessary to a trial.

THE KING
v.
BURDETT.

[*180]

In cases of felony, the Legislature has, on more than one occasion, intervened to prevent the failure of justice, occasioned by the rule to which I have adverted. I am not aware that the Legislature has interposed in any case of misdemeanour; and I cannot help thinking that the absence of any such enactment furnishes an argument to shew that nothing of this kind has been thought necessary, and that it has been generally understood that a conviction for a misdemeanour might take place in the county wherein any such part thereof as I have mentioned should have been committed, for otherwise there would, in many cases, be a great failure of justice. I cannot, therefore, do otherwise than say I am clearly of opinion in the way I have expressed myself, and for the reasons I have given, that if any such part of an entire misdemeanour be proved to have been done in the county in which the indictment is preferred, there is enough to satisfy the locality of trial, and here there is not only the fact of composing the paper in the county of Leicester but some act must have been done by Sir F. Burdett by delivering the paper, or carrying it himself out of that county. Some act must have been done in that county as the commencement of sending it for publication.

The next ground taken in support of the motion for a new trial was, that the learned Judge had rejected evidence offered at the trial to prove that some of the King's subjects had been killed and wounded by the dragoons on the 16th August, or, in other words, that evidence of the truth of the fact, alleged in the libel as the foundation and cause of the remarks therein contained,

[181]

THE KING was tendered and refused. I am of opinion that this evidence
 v. BURDETT. was properly refused. The whole history of the law of libel
 shews that such evidence has been almost invariably refused
 on all occasions of criminal prosecution for slanderous observa-
 tions and remarks upon the administration of the Government,
 or upon the conduct of public or private men. The reason of
 this part of the law has been so often explained, that it is
 altogether unnecessary to enter into it at present. I will only
 quote the opinion of one of the most eloquent writers of antiquity,
 who united the characters of philosopher and statesman. Cicero
 having cited the law of the twelve tables, made for the punish-
 ment of any one, "qui carmen condidisset quod infamiam faceret
 flagitiumve alteri," immediately subjoins "Præclare judiciis
 enim ac magistratuum disceptationibus legitimis propositam
 vitam non poetarum ingeniis habere debemus, nec probum
 audire nisi ea lege ut respondere liceat et iudicio defendere."
 The case of the *Seven Bishops* has been mentioned as an instance
 of evidence received on the part of a defendant; but in that case
 the evidence was not offered to prove any matter of fact men-
 tioned in the supposed libel, which was a petition to the King,
 but to shew that the King had not the power of dispensing with
 an Act of Parliament, which was matter of law; and the evidence
 consisted of *the records of proceedings in Parliament, and was
 addressed to the Court rather than to the jury. The case of
 Mr. Horne, tried before my Lord MANSFIELD, was also quoted,
 as an instance of receiving evidence of facts. Upon looking into
 that case, it appears that Mr. Horne, who conducted his own
 defence, did not open his evidence to the jury, as usual, but sat
 down without proposing to call any witnesses; and when he
 afterwards proposed to call some, and the *Attorney-General*
 objected, Lord MANSFIELD said, "You had better not object; you
 had better hear his witnesses." And they were accordingly
 examined. Such an instance can, in my opinion, be of no avail
 against the current of prior and subsequent practice; it certainly
 can be of no avail against the opinion of the Judges, delivered in
 the House of Lords, in answer to a question on this particular
 point, propounded to them by the House on the occasion of the
 passing of the statute 32 Geo. III. c. 60, commonly called the

[*182]

Libel Bill ; and the still more important fact that the Legislature having its attention directed to this subject at that time, left the law in this respect in the situation wherein the Judges reported it to stand. Another case, that occurred before me, was also referred to ; in that case, however, the truth was not offered in evidence by way of defence, but the evidence of the falsehood was adduced by the prosecutor, as necessary to support the charge. No objection was made on the part of the defendant ; and although I was not free from doubts in my own mind, yet, advertng to the particular nature of the supposed libel, which contained little more than a narrative of certain facts, supposed to have taken place in one of the West India islands, I did not think myself warranted in interposing *under the very peculiar circumstances of that case ; and having received evidence of the falsehood, I should, most undoubtedly, have received evidence of the truth, if any such had been offered, on the part of the defendant.

THE KING
v.
BURDETT.

[*183]

Another ground of the motion was, that the learned Judge gave his own opinion to the jury upon the character of the publication in question, expressing himself at the same time somewhat to this effect : You are to say whether you will adopt this opinion or not ; and unless you are satisfied that I am wrong, you will take the law from me. This was supposed to be contrary to, or at least beyond the duty of the Judge, as prescribed by the statute to which I have just alluded ; it was, however, in my opinion, not only not contrary to or beyond the duty of the Judge as prescribed by that statute, but in strict conformity to it. The clauses of the statute have been referred to. If the Judge is to give his opinion to the jury, as in other criminal cases, it must be not only competent but proper for him to tell the jury, if the case will so warrant, that in his opinion the publication before them is of the character and tendency attributed to it by the indictment ; and that, if it be so in their opinion, the publication is an offence against the law. This has been repeatedly done by different Judges within my experience, and I am not aware of any instance in which it has been omitted. The contrary has sometimes occurred, in cases where the Judge has thought that the matter of the publication was innocent ; but those cases also are instances

THE KING
F.
 BURDETT.
 [*184]

of an opinion given, and not of silence on the part of the Judge, as to the law of the case. The statute was not intended to confine the matter in issue exclusively to the jury *without hearing the opinion of the Judge, but to declare that they should be at liberty to exercise their own judgment upon the whole matter in issue, after receiving thereupon the opinion and directions of the Judge. For these reasons I am of opinion that the rule ought to be discharged.

BEST, J.:

I entirely agree with my LORD CHIEF JUSTICE and my brother HOLBOYD, in the opinion, that if a libel be written in one county and published in another, the libeller may be prosecuted in either.

Rule discharged.

[See sequel, in 23 R. R. (4 B. & Ald. 314).]

K. B. MICHAELMAS TERM.

1820.

[1]

WOOKEY *v.* POLE, BART., AND OTHERS.†

(4 Barn. & Ald. 1—21.)

An Exchequer bill, the blank in which was not filled up, having been placed for sale in the hands of A., he, instead of selling it, deposited it at his bankers, who made him advances to the amount of its value. A. afterwards becoming bankrupt, it was held by three Justices, BAYLEY, J. *dissentiente*, that the owner of the Exchequer bill could not maintain trover against the bankers, the property in such an Exchequer bill, like Bank notes and bills of exchange indorsed in blank, passing by delivery.

THIS was an action of trover for an Exchequer bill, for the payment of 1,000*l.* and interest. The defendants pleaded the general issue; and the cause coming on to be tried at the sittings in London, after Michaelmas Term, 1818, before the Lord Chief Justice, a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case:

† As later cases where the principles of negotiable instruments are discussed, see *Gorgier v. Mieville* (1824) 3 B. & C. 45, 4 D. & R. 641; *Goodwin*

v. Roberts (1876) 1 App. Cas. 476; 45 L. J. Ex. 748; *London Joint Stock Banking Co. v. Simmons*, '92, App. Cas. 201, 61 L. J. Ch. 723.—R. C.

The plaintiff was, on the 1st of November, 1817, proprietor and possessor of a legal and valid Exchequer bill, *worded and signed as follows, “No. 8,988, 12 May, 1817. By virtue of an Act of Parliament quinquagesimo Septimo Geo. III., Regis, for raising the sum of 24,000,000*l.* by Exchequer bills, for the service of the year 1817, this bill entitles or order, to one thousand pounds, with interest after the rate of 2½*d.* per centum per diem, payable out of the first aids or supplies to be granted the next session of Parliament, and this bill is to be current and pass in any of the public revenues, aids, taxes, or supplies, or at the receipt of Exchequer at Westminster after the 5th day of April. Dated at the Exchequer the 12th day of May, 1817. If the blank is not filled up, the bill will be paid to bearer.

WOOKEY
v.
POLE.

[*2]

“GRENVILLE.

“N. B. The cheques must not be cut off.”

Early in the month of November the plaintiff sent such Exchequer bill by his wife to Messrs. Pawsey and Eaton, who were then stock-brokers, carrying on business in copartnership, for the purpose of being sold, and the wife delivered it to them, with orders to sell it for the plaintiff, and to invest the proceeds of such sale in 5 per cent. stock in the plaintiff's name. They, however, did not sell the Exchequer bill as they were directed, nor did they buy any stock for the plaintiff, but took the bill so delivered to them to the defendants, (who carry on business in partnership as bankers, and with whom Pawsey and Eaton had a banking account,) deposited it with them, the same still continuing in blank as to the name of any payee, and in consequence of such deposit, got them to place to the credit of their banking account a sum of 800*l.* on the 7th November afterwards, and another sum of 200*l.* on the 8th of the same month, before the defendants had any knowledge *of the circumstances or terms upon which Pawsey and Eaton held the same bill; but the defendants did not place the Exchequer bill to the credit of Pawsey and Eaton. The latter afterwards, at various times, paid in to the credit of their banking account with the defendants, monies amounting to 300*l.* and upwards

[*3]

WOOKEY
v.
POLE.

and also drew monies out at various times; and on the 27th January, 1818, they had drawn out of defendants' hands all the funds to their credit within 46*l.* 10*s.*, and the balance still remains unsettled. The plaintiff, as soon as he was informed of this misconduct of Pawsey and Eaton, being the 14th January, 1818, applied to the defendants, explained the facts, and required to have the Exchequer bill in question delivered up to him; but the defendants refused to deliver it up to the plaintiff, saying they had advanced money to Pawsey and Eaton on its security. The defendants afterwards, on the 27th January aforesaid, sold the said bill on their own account, and received the proceeds.

* * * * *

[6] The case [having been argued in the previous Term] stood over until this Term, when there being a difference of opinion on the bench, the Judges delivered their opinions *seriatim*.

BEST, J. :

The question which the Court is called on to decide is, whether Exchequer bills are to be considered as goods, or as the representatives of money; and as such, subject to the same rules as to the transfer of the property in them as are applicable to money. The delivery of goods by a person who is not the owner (except in a manner authorised by the owner) does not transfer the right to such goods; but it has been long settled, that the right to money is inseparable from the possession of it. I conceive that the representative of money, which is made transferrable by delivery only, must be subject to the same rules as the money which it represents. It was said by the Court, in *Higgs v. Holiday*, Cro. Eliz. 746, "that where the owner of *money had lost the possession of it, he had lost the property in it, because it cannot be known;" and Lord Holt, recognising this doctrine in the case of *Ford and Hopkins*, Salk. 283, adds, "but if Bank notes, Exchequer notes, million tickets, or the like, are stolen or lost, the owner has such an interest in them as to bring an action into whatsoever hands they are come." It is not because the loser cannot know his money again that he cannot recover it from a person who has fairly obtained the possession of it; for if his guineas or shillings had some private marks on them

[*7]

WOOLLEY
v.
POLE.

by which he could prove they had been his, he could not get them back from a *bonâ fide* holder. The true reason of this rule is, that by the use of money the interchange of all other property is most readily accomplished. To fit it for its purpose the stamp denotes its value, and possession alone must decide to whom it belongs. If this be correct as to money, it must be so as to what is made to represent money, and Lord Holt has himself so decided. In an anonymous case, Salk. 126, he held that trover would not lie by one who had lost a bill of exchange against one who had given for it a valuable consideration. The same judgment was given in the case of a lost Bank note in *Miller v. Race*, 1 Burr. 452. It cannot be disputed but that this Exchequer bill was made to represent money, as much as a Bank note or bill of exchange. It was given for a debt due from Government; it is payable (the blank not being filled up) to bearer, and transferrable by delivery; and is on its face made current, and to pass in any of the public revenues, or at the receipt of the Exchequer. But it has been said, these bills are not used as negotiable instruments, as Bank bills and bills of exchange are; but are the objects *of sale. I do not see why they should not be used as negotiable instruments: they are transferred with the same facility as other bills; and I know from the Legislature that they may be used in payments, for the statutes direct that they should be received for taxes. We also know that bills of exchange are as frequently sold as they are delivered in payment. It is the business of bill-brokers to negotiate these sales. But the great point is, that they are not like goods taken on the credit of the person from whom you receive them, but on that of Government. The receiver never enquires from whom they come, further than to satisfy himself that they are genuine bills. Indeed, when they are in blank, he has no means of ascertaining from whom they come. How could the defendants, in this case, find out that this bill had ever belonged to the plaintiff? It is the plaintiff's own negligence in not filling up the blank, that has rendered it impossible for the defendants to ascertain that he had any right to it; and it would, therefore, be inconsistent with law and justice that, under such circumstances, he should be allowed to call on them to make good

[*8]

WOOKEY
C.
POLK.

[*9]

the loss that has arisen from the fraud of his agent. It seems to be the opinion of LEE, Ch. J., who pronounced the judgment of the Court of K. B. in *Hartop v. Hoare*, 3 Atkyns, 50, that there is no difference between money, Bank notes, and Exchequer bills. His Lordship observes, that Lord HOLT had decided in *Ford v. Hopkins*, "that if money is stolen and paid to another, the owner can have no remedy against him that received it; but if Bank notes, Exchequer bills, or million tickets, or the like, are stolen or lost, the owner has such an interest or property in them as to bring an action into whatever hands they *come." LEE, Ch. J., says, "This must mean that the owner can bring an action into whatever hands they come, without a valuable consideration paid for them; for if it be not thus understood, what Lord HOLT says here will not agree with his former opinion." This also gives me the authority of Lord HOLT for saying that there is no difference between Bank notes and Exchequer notes; and the same learned Judge has decided that bills of exchange pass as money. Should the deposit of this bill with the defendants, under the circumstances in which it was deposited, be considered as pledging the bill, that circumstance will make no difference, if the property in the bill passes by delivery. In *Collins and Martin*, 1 Bos. & P. 648 (4 R. R. 752), a banker pledged bills, indorsed in blank, that had been deposited with him by a customer. The banker had no authority from the owner to part with these bills; but the Court held, that with respect to bills of exchange indorsed in blank property and possession are inseparable. The pawnee had a right to detain the bills until the sum raised on them by the bankers was paid. On these grounds, I think that a nonsuit should be entered in this case.

HOLROYD, J. [and ABBOTT, Ch. J. delivered judgments substantially to the same effect. BAYLEY, J. dissented. But on a point which is now so well settled (see *Brandao v. Barnett*, 12 Cl. & Fin. 787), it seems unnecessary to set forth these judgments at length.]

Judgment of nonsuit.

BATSON AND OTHERS v. DONOVAN AND OTHERS.

(4 Barn. & Ald. 21—43.)

1820.

[21]

A carrier had given notice that he would not be answerable for parcels of value, unless entered and paid for as such; and the plaintiffs, with the knowledge of this, delivered a parcel, containing Bank notes to a large amount, without informing the carrier of its contents. The coach in which the parcel was conveyed was left at midnight standing for some time in the middle of a very wide street, with a porter who was ordered to watch it; during this time the parcel was stolen. At the trial, two questions having been left to the jury, first, whether the plaintiffs had been guilty of any unfair concealment by not informing the carrier of the nature and value of the parcel, and, secondly, whether the carrier had been guilty of gross negligence: Held, by three Judges, (BEST, J. *dissentiente*,) that the direction to the jury was right.

DECLARATION against the defendants, as common carriers, to recover the value of a parcel, containing 4,072*l.* in Bank notes and bills of exchange, delivered to them for the purpose of being conveyed from Berwick-upon-Tweed to Newcastle-upon-Tyne. Plea, Not guilty. At the trial, before Bayley, J., at the Northumberland Summer Assizes, 1819, the jury found a verdict for the defendants. The facts of the case, and the points left to the jury by the learned Judge, are very fully stated by him, in delivering his opinion; and, therefore, it becomes unnecessary to state them here. A rule *nisi* for a new trial having been obtained in last Michaelmas Term,

Cross, Serjt. in Trinity Term last, shewed cause. The defendants, in this case, by their notice, have *declared, that they would not be liable for parcels of a certain value, unless they were entered and paid for accordingly. The plaintiffs, who had frequently sent parcels of value by the defendants, and paid for them as such, did not deal fairly with them, in concealing from them the value of the parcel in question. By that concealment, they deprived the defendants of the increased remuneration, which they were entitled to for the increased risk. In *Tyly v. Morrice*,† the plaintiffs had delivered to a common carrier a bag, sealed up, which they represented to contain 200*l.*, but which, in fact, contained 400*l.* The carrier received 10*s.* per cent. for the carriage and risk of the 200*l.* It was ruled at Nisi

[*22]

† Carthew, 485.

BATSON
v.
DONOVAN.

[*23]

Prius, that the carrier was answerable only for the 200*l.*, because the undertaking was for the carriage of 200*l.*, only, and his reward was to extend no further than that sum, and it is the reward which makes the carrier answerable; and, since the plaintiffs had taken this course to defraud the carrier of his reward, they had barred themselves of that remedy, which is founded only on the reward. In *Gibbon v. Paynton*,† 100*l.* hid in hay, in an old nail bag, was delivered to a carrier, he having given public notice, knowledge of which was traced to the plaintiff, that he would not be answerable for money and jewels, without notice; it was held, however, that the carrier was not answerable, because the plaintiff had been guilty of a fraud, in concealing the money from the carrier. *Nicholson v. Willan*,; is an authority to shew that such notices are legal. In *Beck v. Evans*,§ it was held, that the carrier did not, by these notices, protect himself from the consequences of *his own misfeasance; here, however, the loss has arisen from the negligence of his own servants, one of the ordinary risks to which a carrier is subject, and from the consequences of which he must have intended to protect himself, in cases of parcels of value, by his notice. The cases decided on the subject of concealment, with respect to policies of insurance, apply to the present case, for this is in the nature of insurance. Now if the assured conceal from the underwriter any fact within their knowledge, materially varying the nature of the risk, the policy is void. The question whether a carrier has been guilty of gross negligence, must, in some degree, depend upon the value of the property committed to his care; and, therefore, the knowledge of that value is to him of the utmost importance; for that which might be considered sufficient care, with respect to property of ordinary value, might justly be considered insufficient in the case of money or jewels.

Hullock, Serjt. J. Williams, and Holt, contra :

This verdict cannot be supported, because the carrier is responsible for all losses happening through his personal default, although he may have given notice that he will not be answer-

† 4 Burr. 2298.

§ 14 R. R. 340 (16 East, 244).

‡ 15 R. R. 745 (5 East, 507).

BATSON
v.
DONOVAN.

able for parcels of a given value. The first question left to the jury in this case, assumes, that persons sending articles of value, are bound to give notice of the value to the carrier. That proposition, however, is not supported by any decided case, nor is it recognised as the law of England, by any text writer. The exceptions to the common law responsibility of carriers, are, where the loss proceeds from the act of God or the King's enemies, to which, perhaps may be added, those cases where a party delivering goods to a carrier, fraudulently conceals from him their *value, and thereby deprives him of his reward. In *Kenrig v. Eggleston*,† the plaintiff delivered a box, containing 100*l.*, to the carrier, telling him only that there was a book and tobacco in the box; and ROLLE, Ch. J. held, that the carrier was answerable, for he need not inform the carrier of all the particulars of the box, but it must come on the carrier's part, to make special acceptance. In *Morse v. Slue*,‡ a box with a large sum of money was brought to a carrier, who asked the owner what was in it; he answered, that it was filled with silks and such like goods, of mean value, upon which the carrier took it, and was robbed; it was held, that he was liable, but it was said, that if the carrier had told the owner that it was a dangerous time, and if there was money in it, he durst not take charge of it, and the owner had answered as before, this would have excused the carrier. These cases are authorities to shew, that the carrier, in order to excuse himself, must make a special acceptance. It is true, indeed, that Lord MANSFIELD, commenting in these two cases in *Gibbon v. Paynton*, said, that he did not agree in the doctrine there laid down, for he considered them both as cases of fraud. That was also a case of fraud, and the means used to impose upon the carrier, were equivalent to an actual representation, that the bag contained nothing but hay. Here there is no imputation of fraud; negligence in the plaintiffs or their servants, in not communicating the value of the parcel, is alone insinuated; and the doctrine, therefore, laid down by Lord MANSFIELD, in the case last cited, does not apply here. If it be the duty of a party to notify to a carrier the value of a parcel, *how is it possible to draw a line between those cases, where

[*24]

[*25]

† Aleyn, 93.

‡ 1 Ventris, 238.

BATSON
v.
DONOVAN.

such notice is necessary and where it is not? Must notice be given when the parcel contains linen or muslin, or silk, or only when it contains money or jewels? The safe rule to lay down is, that carriers are always liable, except in the case of fraud. Secondly, it is clear, that a carrier is liable for the consequences of his gross negligence, notwithstanding he may have otherwise restrained his responsibility by notice; for it has been expressly held, that these notices only go to protect him in cases of ordinary accidents, and not from the consequences of his own misconduct. *Beck v. Evans*,† *Bodenham v. Bennett*,‡ *Birkett v. Willan*,§ are authorities in point, and that being so, it follows, that if the defendants were guilty of gross negligence, the plaintiffs were entitled to recover, although they had not disclosed to them the value of the parcel. They then argued, from the facts proved at the trial, that there had been such negligence in the defendants.

Cur. adv. vult.

The case stood over until this Term, when there being a difference of opinion on the Bench, the Judges delivered their opinions *seriatim*.

BEST, J.:

[*26]

This action was brought against the defendants, as common carriers, to recover a compensation for the loss of a box, containing bills and Bank notes to the amount of 4,072*l.* which had been lost out of a stage coach, of which they were the proprietors. The defendants had given notice that they would not be *answerable for parcels of value, unless entered and paid for as such. The plaintiffs knew of this notice. The box was left with one of the defendants, at Berwick, and booked. Nothing was said at the time of the booking, but that it was the box for Newcastle. The box was addressed to Wm. Batson & Co., Newcastle, and had on it a brass plate with the words "Batson & Co." William Batson & Co. were bankers, both at Berwick and Newcastle. The coach arrived at Berwick at twelve at night, and remained

† 14 R. R. 340 (16 East, 244).

§ 20 R. R. 473 (2 B. & Ald. 356).

‡ 18 R. R. 686 (4 Price, 31).

BATSON
v.
DONOVAN.

half an hour in the middle of the street, which is of the width of 80 yards. About a quarter after twelve the box was put into the boot of the coach. A porter was ordered to watch the coach; but this person was at a considerable distance from it, and was so inattentive to his duty that the box was stolen from the coach whilst it was so left in the street, and so watched by the porter. My brother BAXLEY (who tried this cause) left two questions to the jury, viz. 1st, whether the plaintiffs dealt fairly by defendants in not apprising them that the contents of the box were of great value? 2ndly, whether there was in the conduct of the defendants gross negligence? My learned brother told the jury that if they thought the concealment on the part of the plaintiffs was unfair, or that the defendants were not guilty of gross negligence, they should find for the defendants. My single opinion will not affect the rights of these parties; but I feel it my duty to make my humble protest against the introduction of what I think a new principle in the law relative to carriers, viz., that the owner of a parcel of value, such parcel having nothing in its appearance indicative of its contents being of small value, is bound, unasked by the carrier, to state what is its worth. I *am also bound to declare, that the directing the jury that they must find a carrier guilty of gross negligence without any qualification or explanation of what is meant by these terms before they fix him with the loss of a parcel is going much further in his favour than, I think, his liability under the law will warrant. I know of no case in which a Judge has told the jury that they are to consider whether the owner of a parcel made a proper disclosure of the nature of its contents, either to a carrier or inn-keeper. The novelty of such a direction is of itself sufficient to make me pause before I admit its propriety. A carrier who has given no notice is an insurer. Now if a man caused an insurance to the amount of 100*l.* to be effected upon a thing worth 20,000*l.*, can it be said that it is necessary, at the time of effecting the policy, to state to the underwriter the value of the thing insured? Yet the large value in a small compass may tempt thieves to make attacks in rivers and harbours as well as on stage coaches. If the underwriter or carrier want information, they must ask it; and, according to their discretion,

[*27]

BATSON
v.
DONOVAN.

[*28]

protect themselves by warranties or special acceptances. What is to be considered as a parcel of such value, or what are the particular articles that require caution to be given to the carrier? Must it be of the value of 1,000*l.* or 100*l.* or 10*l.* Must it contain jewels or gold? or is the carrier entitled to this indulgence in case a package contains silver, or silks, or laces? None of these points have ever been settled, and they would have been settled long ago if this direction had been usual and proper, and then the decision would have been matter of law for the Judge, and not of fact for the jury. If any fraud be practised on the carrier, the case would *be different; but I cannot consider the non-communication of the contents of a box as any thing like fraud. Any artifice to give the box containing the things of value a mean appearance, and thereby to induce the carrier to think it of no value, and so prevent him from making enquiries, would, I think, be pregnant proof of fraud. Before it was the practice for carriers to give notice, that they would not be answerable for parcels above a certain value, unless entered and paid for according to their value, a carrier was an insurer against all losses, except such as were occasioned by the act of God, or the King's enemies. This responsibility (as it is said in all the old books) was in respect of his reward. That reward must vary, not only according to the weight and dimensions of the parcel and the distance it is to be carried, but also according to its value. The carrier is entitled to have this reward paid to him before he takes the package into his custody. He always was at liberty to make a special acceptance of the goods, and to introduce into the terms of such acceptance any reasonable condition not inconsistent with his duty to the public. To enable him to make a proper charge for the carriage, he is entitled to ask of the owner what is the value of the parcel. If these are his rights, is it not his duty to make these enquiries? and is he not, like persons in any other station, bound to know the duties belonging to that station? Has he then any right to complain that information was not given him when he did not do what he was bound to do to obtain that information? If carriers will make the proper enquiries of those who employ them, they will find they may protect themselves against frauds and accidents

BATSON
v.
DONOVAN.
[*29]

more effectually than by notices ; for if the answers to enquiries represent the *contents of a package as of less value than they are, the carrier will not be liable for more than the value stated by the owner. If the representation be true, he knows the degree of care that such a package requires, and what he may reasonably demand as a compensation for that care, and the risk that he must run in carrying the parcel. Supposing, therefore, the defendants had given no notice, the plaintiffs, unasked by the defendants, were not bound to say a syllable as to the value of the box. The only effect of the notice is to prevent the necessity of a particular enquiry in each case. By these notices their employers are informed that carriers will not be insurers for goods above a certain value, unless paid a reasonable premium of insurance. But these notices do not affect their responsibility as to negligence or misfeasance. It has been said at the Bar, that if the carrier is informed that it is a parcel of great value, he will be more careful of it. I have already said, that if there had been no notice, and the carrier stood in the situation of an insurer, and he wished to proportion his care to the value of his charge and the greatness of his responsibility, he is not entitled to such information respecting a package, unless he thinks proper to ask for it. The notice renders any information as to the value of no importance. Having given such a notice, he is no longer an insurer, except of parcels under the value of 5*l*. Whatever be the value of a parcel delivered to a carrier, who has given such a notice, if he and his servants pay that attention to the safety of his carriage and the packages in it, that a coach loaded with packages, each being under 5*l*. value, requires, he is free from all responsibility. If he or his servants fail to pay that attention, and a parcel should be lost in *consequence of the negligence, for that negligence he is responsible, whatever be its amount. With the greatest deference to my learned brother who tried this cause, the jury (being told that they were only to consider the value of the box when they were deciding on the damages to be given) should only have been asked whether they thought the defendants had sufficiently guarded a coach containing many parcels, each of small value, whilst it was left without horses in the street at Berwick. On the second point, I am of opinion

[*30]

BATSON
v.
DONOVAN.

that the jury should have had some explanation of what is meant by gross negligence. Without some explanation, they would think that it means conduct highly blameable. Yet something much short of that sort of conduct will be sufficient to make a carrier responsible. He and his servants must take all the care that is necessary for the preservation of the property committed to his charge. They must take the same care of it that a prudent man would take of his own property. This is the law with respect to all bailees for hire or reward. Can I say that such care was taken of this property when I find the coach was left in such a situation in the street, that the owners thought it right to place some one to watch it, and that person was either at so great a distance from the coach, or so inattentive to his duty, as to allow persons to go to the coach and steal the box. *Gibbon v. Paynton*,† has been referred to; but there is this difference between that case and the present, namely, that in that case the gold was packed in an old nail bag, which was stuffed with hay to give it a mean appearance. The whole Court *very properly considered that this mode of packing so valuable an article was a fraud, and gave their judgments expressly on that ground. There is a difference between silence and any act done to conceal. The latter may be fraudulent; the former never can. This is a case of silence only. For these reasons, I am of opinion that there ought to be a new trial.

[*31]

HOLROYD, J.:

If the carrier had given no notice in this case, that he would not be answerable for parcels of value, it seems to me that it would not have been the duty of the plaintiffs, when they brought goods to him, to specify their quality or value; for then it would have been his duty to make enquiry, if he either wished to have a reward proportionate to their value, or to know whether they were goods of that quality for which he had a sufficiently secure conveyance; for if he had not, he might lawfully have refused to take them. In this case, however, the carrier had, by his notice, expressly refused to accept parcels of value without being paid for them accordingly. The reason for his giving such notice is,

† 4 Burr. 2298.

BATSON
v.
DONOVAN.

on account of the risk in the carriage, that he may claim an adequate reward for it, and also that he may use due care and be provided with sufficient means to guard against any loss. With respect, therefore, to the goods which he takes, he requires a remuneration in proportion to the value. Now the plaintiffs, knowing this, delivered the box in question, containing notes and bills, which the carrier had, by his notice, refused to take, unless entered and paid for accordingly, and they delivered it without giving him any information as to its contents. They held it out, therefore, to him as an ordinary article, which he would have no objection to *take as of course. That is a material circumstance in this case, and makes it very distinguishable from those cases where no notice is given by the carrier, or if given, is not known by the plaintiffs; for unless the notice had been brought home to their knowledge, they would be in the same situation as if there had been no notice at all. In cases where the carrier has not given notice, or where the notice does not come to the knowledge of a plaintiff, he holds himself out, as a common carrier, to take goods in general; and he would then be bound to enquire the value, either if he expects an additional reward, or if he has any objection to carry any particular article. But that reason does not apply to a case where the owner of the goods had notice that the carrier would not be responsible for goods of a particular description. Perhaps, indeed, the carrier might not have a right absolutely to refuse taking goods of this description. I by no means say that he has. It has been laid down, that where a carrier has convenience to carry goods, he cannot refuse to take the goods of any particular person; and, possibly, an action might lie against him if he refused to take such goods, without a sufficient reason for the refusal. It would, however, be a reasonable excuse for not carrying goods of great value, either if it appeared that the carrier did not hold himself out as a person ready to convey all sorts of goods, or that he had no convenient means of conveying with security such articles. And so it was held in *Jackson v. Rogers*.† Here the plaintiffs knew that the carrier refused to take goods of this quality, unless entered and paid for accordingly; and yet they delivered *them

[*32]

[*33]

† 2 Show. 327.

BATSON
v.
DONOVAN.

as things which the carrier was to take as of course. Now, I think it was the duty of the plaintiffs, in bringing such articles to the carrier, not to deliver them as ordinary goods, but to inform him of their nature and value; and the not doing so appears to me as direct an act of concealment as that in the case of *Gibbon v. Paynton*, where the circumstance of placing money and other valuable articles in hay, so as to make the carrier believe that no such articles were there, was held to be a fraudulent concealment. For a concealment may be effected not merely by direct acts done by a party himself; but likewise by his not doing what it is his duty to do, and, by that, deceiving the person to whom he brings the goods. Here, the owner of this valuable property delivered it as an article requiring no extraordinary care; he held out, therefore, to the carrier, as plainly as if he had told him so, that these were goods which the carrier would not object to take on the ordinary terms, and that he was to consider them as such. The carrier had, then, every reason to think that they were articles to which the notice did not apply; for, otherwise, he would have had a right to expect that their quality would be specified. And why was the nature of the goods not mentioned? Because the carrier would either have refused to take the goods, or, if he did consent to carry them, would have demanded a higher premium. The owner of the goods, therefore, withheld that knowledge which it was his duty to have given, and that in point of law was a concealment on his part. Then the question arises, whether there was a misdirection. The learned Judge left two points to the jury; 1st, whether there was negligence in the plaintiffs' not specifying the contents of the *box to the carrier; 2ndly, whether there was gross negligence in the defendants. With respect to the first, I think it was the plaintiffs' duty to specify the contents, and that it was a fraud and deceit in law on their part in not doing so. In my opinion, the carrier cannot be considered as having consented to receive and carry these articles, by reason of the notice which he had given, and his ignorance of their quality. I think, therefore, he is not answerable as a carrier, nor even as a bailee, on account of the legal fraud of which the plaintiffs were guilty. The maxim, "*Ex dolo malo non oritur actio*," applies to this case.

[*34]

The second question is, whether there was gross negligence on the part of the defendants. I think that question was properly left to the jury, and that we cannot say, upon the evidence, that they have drawn a wrong conclusion. I think, therefore, that the verdict ought to stand.

BATSON
v.
DONOVAN.

BAYLEY, J. :

The box, in this case, contained bills, cheques, and notes of the value of 4,072*l*. The defendants had given notice that they would not be answerable for parcels of value unless they were entered and paid for as such. The plaintiffs knew of this notice. The box was left with one of the defendants at Berwick, with no other observation than this, "It is the box for Newcastle." Nothing was said as to what it contained, nor did any of the defendants know it contained articles of value. It was directed, "Wm. Batson, Newcastle," and had on it a brass plate, "Wm. Batson & Co.;" it was locked and corded, not sealed. W. Batson & Co. were bankers at Berwick and Newcastle. The coach arrived at twelve, and stayed at Berwick half an hour; it stood in the middle of the street, about thirty yards from the *pavement. About a quarter after twelve, the box was put into the boot of the coach, and a porter watched the coach; but he was not so attentive as he might have been, and the box was probably stolen from the boot whilst he was upon the watch, by some person who contrived to elude his notice. The horses were brought to the coach about ten minutes after the box was put in, and till that time nobody was with the coach, except the porter. There was no misfeasance in the defendants or any of their servants. I left, I believe, these two questions to the jury. First, whether the plaintiffs dealt fairly by the defendants, in not apprising them that the box contained articles of value; and, secondly, whether, in the case of a parcel of such value as the defendants might fairly expect this to be, there was gross negligence in the defendants; and I rather think I left those questions in such a way, that unless the jury were with the defendants on both, they should find for the plaintiffs; but I am not confident upon that point. And unless the first of these points, that the plaintiffs did not deal fairly by the defendants,

[*35]

BATSON
v.
DONOVAN.

[*36]

in omitting to apprise them of the value of the box, will, under the circumstances of this case, sustain the verdict, I think there ought to be a new trial. This was a case of negligence only, not of misfeasance. Such want of fair dealing on the part of the plaintiffs is an answer to the action. There may be two objects in such a notice as this; the one, to secure to the coach-proprietor a compensation proportional to his risk; the other, to enable him to put parcels of the greatest value in a place of the greatest security. The risk upon a parcel of great value, is greater than that upon a small one. The value is a temptation to thieves to make attempts which, but for that value, they would not *make. The omission, therefore, to apprise the coach-proprietor of the value, operates in two ways. It deprives the proprietors of the extra compensation they ought to have, and it prevents them from taking that extraordinary caution which, upon a parcel of extraordinary value, they naturally would take. The value is an ingredient to be taken into consideration upon the question of gross negligence; for that may be gross negligence in the case of a parcel of extraordinary value, which, in the case of another parcel, would not be so. The trusting a parcel of 5,000*l.* or 10,000*l.* for a moment, out of the personal care and superintendence of a trustworthy servant, would, if it were stolen during that interval, be gross negligence; but the trusting a parcel of 40*s.* value in the same way would not. Why? because parcels of great value are a great temptation to thieves to be on the watch for them; parcels of small value are not. In the case of a box or parcel known to be of great value, the proprietors may take the extraordinary care of putting it into the personal charge of the coachman or guard, or even of sending a special messenger with it, or going with it themselves; and these are precautions which in the case of a thing of ordinary value they would not think of taking. Now, if a plaintiff, by omitting what he ought to do, prevents a defendant from taking that extraordinary care which, but for that omission, he probably would have done, has he a right to complain? To what is the loss to be ascribed? To his omission. It is upon him, therefore, that the loss ought to fall. Had the defendants been apprised that this box contained the value of 4,072*l.*; that so very large

an inducement was held out to thieves, and that the loss of it would make them answerable to that extent, can any *one believe that they would not have taken more care of it, than they did? Then the persons who prevented them from taking this extra care, viz. the plaintiffs, ought to bear the loss. Again, if this parcel had been of the value of 5*l.* only, it probably would not have been lost. The temptation to thieves would have been less. The value, however, makes it above an ordinary risk. Now the holding out as an ordinary risk what is really an extraordinary one, is a legal fraud, "*dolus malus*," and, "*ex dolo malo non oritur actio*." A carrier is, to a certain extent, an insurer, and concealment, if it varies the risk, discharges the underwriter. The value here does increase the risk; that value is concealed, it is concealed wrongfully; then why is the defendant to be liable? The case of *Gibbon v. Paynton*† seems to me to come very near the present case. There 100*l.* was hid in some hay in an old nail bag, and was sent by the coach. The proprietor had given a notice that he would not be answerable for money, unless he had notice what it was; the plaintiff knew of the notice, but did not apprise the proprietor that there was money in the bag. The jury found for the defendant; and on a rule *nisi* for a new trial, and cause shewn, the Court held the verdict right. Lord MANSFIELD said, "A common carrier, in respect of the premium he is to receive, runs the risk of goods, and must make good the loss, though it happen without any fault in him, the reward making him answerable for the safe delivery. His warranty and insurance is in respect of the reward he is to receive, and the reward ought to be proportionate to the risk. If he makes a greater warranty and insurance, he will take greater care, use more caution, *and be at the expense of more guards or other methods of security; consequently, if the owner of the goods have been guilty of a fraud upon the carrier, such fraud will excuse the carrier. And here the owner was guilty of a fraud upon him: he meant to cheat him of his hire." Mr. Justice YATES said, "A common carrier insures goods, but he ought to be apprised what it is he undertakes, and then he will, or, at least, may, take proper care. But he ought not to be answerable

BATSON
DONOVAN.
[*37]

[*38]

† 4 Burr. 2298.

BATSON
v.
DONOVAN.

where he is deceived. Here he was deceived." Mr. Justice ASTRON said, "It manifestly appeared that this was money sent under a concealment of its being money. The true principle of a carrier's being answerable is the reward; and a higher price ought, in conscience, to be paid him for the insurance of money, jewels, and valuable things, than for insuring common goods of small value:" and the rule was discharged. This case comes so near to the present, that I can hardly distinguish it. The plaintiffs here concealed; the defendants had not their due reward; the defendants were deprived of that which, according to this case, is the foundation of the carrier's liability, viz. a reward proportionable to the risk; and by not being apprised of what they received, they were not put upon their guard to take what, with reference to this article, would have been proper care. In *Clay v. Willan*,† where the notice was that cash would not be accounted for, if lost, of more than 5*l.* value, unless entered, and one penny insurance paid for each pound value, and the plaintiff, knowing of the notice, sent a parcel of light guineas, without stating what they were, the defendants were held not to be liable, even to the extent of 5*l.* The *reasons are not given, but it probably went upon the construction of the notice. *Izett v. Mountain*‡ is exactly to the same effect. In *Clarke v. Gray*,§ a notice "that no more than 5*l.* will be accounted for, for any goods or parcels, unless entered as such, and paid for accordingly," was held to leave the carrier liable only to the extent of 5*l.* in respect of goods of higher value. In *Harris v. Packwood*,|| LAWRENCE, J. noticed at the trial, that there was good reason why a carrier should be made acquainted with the value of the goods, that he might take the greater precaution against fire, or greater force to resist felons; and on the rule *nisi* to enter a nonsuit, HEATH, J. observed, that in some carriages there are particularly safe places to deposit jewels and articles of superior value, when known to be such; and LAWRENCE, J. said, there was nothing unreasonable in a carrier requiring a greater sum, where he carried goods of a greater value, for he is to be paid not only for his labour in carrying, but for the risk he runs, which

† 1 H. Black. 298.

‡ 4 East, 371.

§ 6 East, 564.

|| 15 R. R. 755 (3 Taunt. 266).

BATSON
v.
DONOVAN.

is greater in proportion to the value; and the defendant having given a notice, which the plaintiff knew, the rule was made absolute for a nonsuit. *Bignold v. Waterhouse*† contains a similar doctrine; but there was another point, that the contract was with one of the defendants alone, and not with the firm, and, on that ground alone, Lord ELLENBOROUGH's opinion proceeded. These authorities induce me to think, that the defendants had a right to be apprised by the plaintiffs, that this box contained articles of value, and that the plaintiffs' neglect in this case, there being no misfeasance on the part of the defendants, is an answer to the action. The authorities *relied upon for the plaintiffs, are, as it seems to me, cases of misfeasance. *Ellis v. Turner*‡ was the case of wrongfully carrying the goods beyond the place at which they were to be delivered; they were to be delivered at Stockwith, between Hull and Gainsborough, and were carried beyond Stockwith. *Beck v. Evans*§ is put by Lord ELLENBOROUGH, distinctly, as a case of misfeasance: there the carrier wrongfully drove on a cask of brandy, when he was told it was leaking. *Birkett v. Willan*|| was a case of misfeasance also, for that was a wrongful delivery to a person who had no colour for receiving. In *Bodenham v. Bennett*¶ the defendant's bookkeeper knew at the time he received the parcel that it contained Welsh notes, and yet he demanded no extra-payment: it did not appear that plaintiffs knew of the notice, and the Court thought that the parcel was carried beyond its destination, which would make it a case of misfeasance. In *Smith v. Horne*†† the parcel was not of extraordinary value. The question of fair dealing, in not specifying the value, was never raised, and the defendants sent their goods for delivery in London by a cart, which had only one person to attend it, which might be deemed misfeasance, it being the general custom to send two persons with such carts. Upon the ground, therefore, that the defendants ought to have been apprised of the value of this box, and were not, that the plaintiffs were guilty of misconduct in this respect,

[*40]

† 1 M. & S. 255.

‡ 5 B. R. 441 (8 T. R. 531).

§ 14 B. R. 340 (16 East, 244).

|| 20 B. R. 473 (2 B. & Ald. 356).

¶ 18 B. R. 686 (4 Price, 31).

†† 17 B. R. 683, 19 B. R. 480
(Holt, N. P. 643, 2 Moore, 18,
8 Taunt. 144).

BATSON
v.
DONOVAN.

[*41]

that the plaintiffs' neglect deprived the defendants of the compensation they ought to have received, and prevented the defendants from taking the care which they otherwise would have done, and that the value of *the parcel increased the probability of loss, I am of opinion that the plaintiffs' neglect is, under the circumstances of this case, a bar to the action.

ABBOTT, Ch. J. :

I am of opinion that the case was properly left to the jury by my learned brother at the trial, and I think the verdict of the jury warranted by the evidence. It is unnecessary for me to repeat the facts. The main objection to the Judge's direction is, that he desired the jury to consider whether there had been any thing like unfair dealing or want of proper caution on the part of the plaintiffs. It cannot be denied, that if the owner of goods deceive the carrier as to their quality and value, he shall not hold the carrier responsible. This is laid down in *Gibbon v. Paynton*,† and the cases there cited. In that case money was sent hid in hay in an old nail-bag, by a person who did not disclose the contents of the bag, and was not asked to do so, and who knew the carrier had given notice that he would not be answerable for money, unless he should have notice that money was delivered to him. In the present case Bank notes, in a box, are delivered to a carrier, without disclosing the contents of the box, the carrier having given notice that he will not be answerable for notes unless entered and paid for accordingly, and the plaintiff being acquainted with such notice. Thus far, therefore, the two cases appear to me to be very little different from each other. In the case of *Gibbon v. Paynton*, however, there was no proof of particular negligence on the part of the carrier ; whereas, in the present case, it is contended, and probably rightly so, that there was *great negligence on the part of the carrier ; the coach having been left standing for some space of time at midnight in the middle of a wide street, and no guard or watchmen within some yards of it, the box in question having been put into the boot. And it was contended, that for such gross negligence the carrier must answer, notwithstanding his notice, and

[*42]

† 4 Burr. 2298.

BATSON
v.
DONOVAN.

the manner in which the box was delivered to him; and the case of *Bodenham v. Bennett*, was cited and relied upon. But in that case there was reasonable evidence that the driver knew the quality of the parcel; in the present case, I think such evidence is wanting. Now the degree of care that a man may be reasonably required to take of any thing, depends, in my opinion, upon the quality and value of the thing, and the temptation thereby afforded to theft. *Magno periculo custoditur quod multis placet*. And it cannot, I think, be denied, that a small box containing Bank notes or money affords much greater temptation to theft than a parcel of equal size containing less valuable articles, or a larger and more bulky parcel of considerable value, a small box being a thing easily removed and concealed, and notes being things easily disposed of, and made profitable to a thief. If the carrier had known the contents of this box, he certainly *ought* to have placed it in a less exposed part of his carriage, or to have caused the carriage to be better watched; he ought to have done so; probably he would have done so: I cannot take upon myself to say that he would not. And I think an opportunity of doing so ought to have been given to him by some intimation of the contents of the box that he was required to convey. The negligence of the servants of common carriers has been for a long time a subject of frequent and just complaint, and it is the *duty of Courts, as far as shall be consistent with justice and law in each particular case, to follow up the good old principle of the common law, and do every thing that may induce greater care and attention. But we must not, where a notice like the present has been given, require more care at their hands than may reasonably be required, adverting to all the particulars of the case before us. And I think we should do this, if we were to say that the jury might not have been reasonably desired to consider the conduct of the plaintiffs in this transaction, or that the conclusion which the jury have drawn in favour of the defendants was not reasonably warranted by the evidence before them. I am, therefore, of opinion that the rule ought to be discharged.

[*43]

Rule discharged.

1820.
Nov. 8.

[47]

IN THE MATTER OF THE EXECUTORS OF AITKIN,
DECEASED.

(4 Barn. & Ald. 47—49.)

Where the employment of an attorney is so connected with his professional character as to afford a presumption that his employment was in consequence of that character, the Court will interfere in a summary way to compel him faithfully to execute the trust reposed in him; and therefore, where an attorney was employed by A. to collect and get in the effects due to him as administrator of another person, the Court compelled the attorney to render an account to the executors of A. of the monies, &c. received by him, although he had never been employed by A. or his executors to conduct any suit in law or equity on his or their behalf.

[*48]

SCARLETT had obtained a rule, calling upon Mr. Blamire, an attorney of this Court, to shew cause why he should not deliver to the attornies of the executors *of John Aitkin his bill of costs, in relation to business done for the said John Aitkin, deceased, as administrator of George Aitkin, deceased; and also an account of his receipts and payments in respect of the estate of George Aitkin; and why he should not pay over the balance in his hands, and deliver up all deeds, papers, and writings in his custody or power belonging to the said executors. It appeared from the affidavits that Mr. Blamire had been employed by John Aitkin as his attorney and agent, to collect and get in the effects of George Aitkin, and that he had received considerable sums of money on that account: that repeated applications had been made by the executors of John Aitkin for this account, and for his bill of costs relating thereto; which had all been ineffectual. The affidavits in answer stated, that Mr. Blamire never was employed either by John Aitkin or by his executors in prosecuting or defending any cause or suit, or other proceeding in this court, or in any other court of law or equity.

Littledale shewed cause, and contended that this was an answer to the present application; and he cited *Cocks v. Harman*,† where an application for a rule upon the defendant, to deliver up to the plaintiff an account similar to the present, was refused, And in *Ex parte Lowe*,‡ a similar application was refused.

† 8 R. B. 505 (6 East, 404; 2 Smith, 409).

‡ 8 East, 237.

Scarlett, contra :

In the Matter
of
AITKIN.

If this rule be made absolute, it will be for the advantage of the attornies themselves, for it will prevent them from having it in their power to do that which is wrong, and the exercise of this summary *jurisdiction over them, as officers of the Court, will be equally for the advantage of the public; and he cited *Hughes v. Mayre*,† and *Strong v. Howe*,‡ where the Court compelled an attorney to deliver up deeds entrusted to him by his clients; and he contended that no distinction could be made between the delivering up of deeds and the payment of the money in dispute.

[*49]

ABBOTT, Ch. J. :

The question in this case is, whether this Court will compel an attorney to do that which in justice he ought to do. Now the rule by which the Court [is] § to be governed in exercising this summary jurisdiction over its officers seems to me to be this; where an attorney is employed in a matter wholly unconnected with his professional character, the Court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him. But where the employment is so connected with his professional character as to afford a presumption that his character formed the ground of his employment by the client, there the Court will exercise this jurisdiction. And the case where the Court compelled the attorney to deliver over deeds, placed in his hands for the purpose of making a conveyance, proceeds upon this ground. For inasmuch as a conveyance requires knowledge of law, the trust is reposed by the client in the party, in respect of his being an attorney. I am of opinion that the facts in this case bring it within this rule, and that the rule ought to be made absolute.

Rule absolute.

† 3 T. R. 275.

‡ 1 Strange, 621.

§ "Are" in the report.

1820.
Nov. 9.

CRAWSHAY AND OTHERS *v.* HOMFRAY AND OTHERS.†
(4 Barn. & Ald. 50—53.)

[50]

The wharfage, &c. due upon goods imported was, by the course of trade, paid by the importer at the Christmas following the importation. whether the goods were in the mean time removed or not. The goods were sold to A., and, after Christmas, the merchant importer became bankrupt: Held, that there was no lien on the goods for the wharfage, &c. as against A.

TROVER for iron. Plea, general issue. At the trial at the last sittings at Guildhall, before Abbott, Ch. J. it appeared that the iron in question had been imported by Messrs. Tottie & Co., and landed at defendants' wharf on the 14th October. On the 15th October the plaintiffs purchased the same of Tottie & Co., and the order for delivery of it was given, and the price paid to Tottie & Co. by the plaintiffs on the following day. A part of the iron was subsequently delivered to the plaintiffs at different times, till March following, when, in consequence of Tottie & Co. having become bankrupts, the remainder of the iron, amounting to about 90 tons, was detained by the defendants, who claimed a lien upon it for their charges in respect of wharfage, &c. These charges amounted to about 126*l.*, and the course of dealing proved as to them was that they were usually paid by the merchant importer at the Christmas following the importation, whether the iron had been removed in the mean time or not. Upon the trial, the LORD CHIEF JUSTICE was of opinion that the defendants were not entitled to a lien upon the iron for these charges; and the jury, under his direction, found a verdict for the plaintiffs. And now

Marryat moved for a rule *nisi* to set aside this verdict, and to enter a nonsuit. If in this case the usual time for payment of the charges upon the iron had not arrived, the case would be very different. Here, however, *it had expired, and the money was demandable at the time when the lien was claimed, and this brings the case within the authority of *Stevenson v. Blakelock*,‡ in which this very distinction was taken, between that case and

[*51]

† Distinguished in *Fisher v. Smith* 411.—R. O.
(1878) 4 App. Cas. 1; 48 L. J. Ex. ‡ 14 R. R. 525 (1 M. & S. 535).

Cowell v. Simpson.† It was, indeed, formerly laid down, in *Bremm v. Currant*,‡ that wherever there was a special agreement, there could be no lien; but that must now be taken subject to the observations made by GIBBS, Ch. J. in *Hutton v. Bragg*,§ where he cites 2 Roll. Ab. 92 M. pl. 2, 6, and Cro. Car. 271, and Yelv. 66; and, there that learned Judge expressly guards against the being understood as saying that the lien which had been taken away by an agreement to pay in bills would not be restored after those bills had been dishonoured. And in *Chase v. Westmore*,|| this Court held, that an agreement to pay a miller in a particular manner did not deprive him of his right of lien. Here, perhaps, in the interval between October and Christmas the defendant's right of lien was suspended; but upon the failure of Tottie & Co. to pay at that time, the right of lien was restored.

CRAWSHAY
v.
HOMFRAY.

ABBOTT, Ch. J. :

I think we ought not to grant any rule in this case. It is distinguishable from the authorities which have been cited. Here it is clear that, at the time when this iron was originally purchased by the plaintiffs, these defendants had no lien upon it for these charges. Now can it be contended that after this a lien upon these goods, the property of the plaintiffs, is to arise from a subsequent default in payment by other *persons. I think it cannot; and, therefore, retain my opinion at the trial, that the plaintiffs are entitled to recover.

[*52]

BAYLEY, J. :

According to the usage of trade, it appears that in this case a specific time is given to the merchant importer for the payment of these dues. The iron in question, which originally belonged to Tottie & Co., was by them sold to the plaintiffs in October, and at that time the plaintiffs had clearly a right to the delivery, without any lien being claimed by the defendants. In consequence of this, on their application, a great part of it is delivered.

† 10 B. R. 181 (16 Ves. 275).

Marsh. 339, 345).

‡ Bull. N. P. 45.

|| Selw. N. P. 1322.

§ 17 B. R. 431 (7 Taunt. 14; 2

CRAWSHAY
v.
HOMFRAY.

How, then, can the non-delivery of the remainder, till after the debt due from Tottie & Co. has become payable, make any difference? As it is clear that at the time of the sale the defendants had no lien, I am of opinion that the subsequent non-delivery did not give any new right of lien to them.

HOLROYD, J.:

The principle laid down in *Chase v. Westmore*, where all the cases came under the consideration of the Court, was this, that a special agreement did not of itself destroy the right to retain; but that it did so only where it contained some term inconsistent with that right. Now if by such agreement the party is entitled to have the goods immediately, and the payment in respect of them is to take place at a future time, that is inconsistent with the right to retain the goods till payment. That was the case here: the wharfage was not payable till Christmas, and by the sale the plaintiffs had a right to an immediate delivery of the goods. And the subsequent default of Tottie & Co. *to pay the debt due from them will not alter the case. I think, therefore, that the defendants had in this case no right to retain, and that this verdict is right.

[*53]

BEST, J.:

The principle has been truly stated, that unless the special agreement be inconsistent with the right of lien, it will not destroy it. Here, however, it seems to me that it was inconsistent, the wharfage not being, by the usage of the trade, payable till a subsequent period, and the goods being to be delivered immediately. There was, therefore, in this case no original right of lien in respect of these charges; and I am not aware of any case where it has been decided that a subsequent default in payment can give such a right where it did not originally exist.

Rule refused.

DOE, ON THE DEMISE OF SIMON WESTLAKE, *v.*
SIMON WESTLAKE.†

(4 Barn. & Ald. 57—59.)

1820.
Nov. 13.

[57]

A testator by his will devised to Matthew W., his brother, and Simon W., his brother's son, a certain estate. It appeared that the testator had three brothers, each of whom had a son of the name of Simon, living at the time of the testator's death: Held, that the proof of this fact did not raise any latent ambiguity in the will, so as to let in parol evidence of declarations of the testator, as to the person intended; it being clear, that the person entitled was Simon, son of Matthew.

EJECTMENT for a moiety of certain premises in the county of Devon. Plea, not guilty. At the trial before Graham, B. at the last assizes for the county of Devon, the plaintiff claimed under the will of his uncle Simon Westlake, of Exbourne, in the county of Devon, by which, among other things, he bequeathed unto his brother, Thomas Westlake, 20*l.*; to Elizabeth Luxton, his brother Richard's daughter, 10*l.* and the use of a house during her life; and he then gave and bequeathed unto Mary, the wife of Matthew Westlake, his brother, the yearly sum of 5*l.* to be paid her by her husband out of his moiety of the tenement called Stone: then followed the devise upon which the question turned, "I give, devise, and bequeath unto Matthew Westlake, my brother, and to Simon Westlake, my brother's son, all that my fee-simple messuage or tenement called Stone, situate in Exbourne, in the county of Devon, which said premises I give and devise to each of them, jointly and *severally alike, and to each of their heirs and assigns for ever, subject to the payment of the annuity to my wife, before mentioned, as well as to the payment of the legacies given by the will; and I charge my real estate with the payment of such legacies. I likewise give and bequeath unto Matthew Westlake, my brother, and to Simon Westlake, jointly and severally alike, all other my messuages, tenements, lands, goods, and chattels, and testamentary estates whatsoever, and I appoint them executors of my will." It appeared in evidence that the testator had three brothers, Thomas, Richard, and Matthew, each of whom had a son of the

[*58]

† Distinguished, *Fleming v. Fleming* (1862) 1 H. & C. 242; 31 L. J. Ex. 419. Followed in *Webber v. Corbett* (1873) L. B. 16 Eq. 515, 519; 43 L. J. Ch. 164.—R. C.

DOE
v.
WESTLAKE.

name of Simon, living at the time of the testator's death. The defendant's counsel contended that that established a latent ambiguity in the will, and they tendered evidence of declarations of the testator to shew that he had intended to bequeath his property to the defendant, Simon Westlake, who was the son of Richard Westlake. The learned Judge received the evidence. The jury, however, found a verdict for the plaintiff. And now

Moore moved for a new trial, on the ground that this verdict was against the evidence; but

ABBOTT, Ch. J. :

[*59]

It is unnecessary to consider whether this verdict was against the evidence; for I am very clearly of opinion that the declarations of the testator ought not to have been received in evidence at all. It is perfectly true, that a latent ambiguity may be raised by the proof of some fact not to be collected from the will itself; but then the fact must be such as, when proved, will raise an ambiguity in the will. Now the fact of the three brothers of the testator having each a *son of the name of Simon does not raise any ambiguity upon this will. The devise upon which the question turns forms a distinct independent sentence, and is in these words: "I give, devise, and bequeath unto Matthew Westlake, my brother, and unto Simon Westlake, my brother's son." Now it seems to me that, in point of legal construction, when the testator is speaking of his brother's son, he must be taken to speak of the son of that brother who was then particularly in his mind. Matthew Westlake was the brother then in the mind of the testator; and, consequently, Simon Westlake, his son, must be the person intended. Admitting it, therefore, to be the fact that the testator had three brothers, each of whom had a son of the name of Simon, I cannot entertain the least doubt that he intended by this devise to give the property to Simon the son of Matthew Westlake. If that be so, there was no ambiguity in the will; and, therefore, the evidence ought not to have been received. I am, therefore, of opinion that there is no ground for a new trial.

Rule refused.

AUBIN *v.* DALY.

(4 Barn. & Ald. 59—67.)

1820.
Nov. 17.

[59]

By letters patent, 24 Car. II., the King granted to the use of A., his heirs and assigns for ever, an annuity of 1,000*l.*, to be paid out of his revenue of four and a half per cent. at Barbadoes and the Leeward islands: Held, that this annuity was personal property, and duly passed under a will attested by two witnesses, by a residuary clause bequeathing all the rest, residue, and remainder of a testatrix's personal estate, of what nature or kind soever, to her executors.

By letters patent, under the great seal of England, dated July 19, 24 Car. II., as well in consideration of the surrender by the Earl of Kinnoul, into the hands of *the Crown, of the Caribbee islands, and certain other islands, and possession therein referred to, and all his estate, claim, and demand in or to the same, as also for divers other good causes and considerations, his Majesty did, for himself, his heirs and successors, give and grant unto the said Earl one annuity of 600*l.* of lawful money of England, to hold, enjoy, and receive the same, to him the said Earl, his executors, administrators, and assigns, for the term of five years, from the feast of Saint Michael the Archangel, then last past. And the King also granted unto the Earl of Kinnoul and his heirs, one other annuity of 1,000*l.*, of lawful money of England, to him the said Earl, his heirs and assigns; to the only proper use and behoof of the said Earl, his heirs and assigns for ever, from and immediately after the end and expiration of the said term of five years, without any account or other matter or thing to be rendered or given for the same; which said respective annuities the King appointed should from time to time be duly paid to the Earl, his heirs, executors, administrators, and assigns, at the four most usual feasts and terms in the year, out of his Majesty's revenue of 4½ per cent., at Barbadoes and the Leeward islands, as the same should come into the receipt of his Majesty's Exchequer, or by levying tallies of assessments upon the farmers or collectors of the said revenue for the time being, notwithstanding any debt or debts charged or chargeable upon the said revenue, or any part thereof, the first payment to commence from the feast day of Saint Michael the Archangel; and if it should happen that the said revenue of 4½ per cent. should at any time or times after the expiration of five

[*60]

AUBIN
v.
DALY.
[*61]

years fall short of the said annuities, then the King *granted that the same should be fully made up to the said Earl, his executors, administrators, and assigns, out of any other treasure of his Majesty, his heirs and successors, at any time being or remaining in the receipt of his Exchequer; and his said Majesty did thereby authorise the commissioners of his treasury, &c. to give warrant for the levying tallies of assessment from time to time upon the farmers or collectors of the said revenue of $4\frac{1}{2}$ per cent. at Barbadoes and Leeward islands aforesaid, for the time being, for the due payment of the said annuity of 1,000*l.* to the said Earl, his heirs, executors, administrators, and assigns respectively, as aforesaid; and did declare, that the receipt of the said Earl, his heirs, executors, administrators, and assigns respectively unto the said farmers and collectors, should be sufficient discharge. By virtue of various subsequent conveyances and assurances, and, ultimately, by virtue of a certain indenture, bearing date the 26th day of May, 1773, the annuity of 1,000*l.* was granted, bargained, and sold unto William Stafford, to hold the same unto and to the use of him, his heirs, executors, administrators, and assigns respectively, for ever, subject, nevertheless, to a proviso in the said indenture contained, whereby it was declared, that if the grantors, or such persons who for the time being should be entitled to the freehold or inheritance, or other beneficial interest of and in the same annuity, or any part thereof, or any or either of them, should pay or cause to be paid unto the said William Stafford, his heirs, executors, administrators, and assigns, the principal sum of 12,981*l.* 14*s.* 10*d.* with interest, at the rate of $4\frac{1}{2}$ per cent., at certain times in the same indenture mentioned, and long since past, he the said William Stafford, his heirs or assigns, would, at their *request and at their charges, re-grant the said annuity, and all arrears thereof, unto and to their use, or unto such person or persons as they should appoint in that behalf, freed and discharged from all mesne incumbrances. The said principal money was not paid to Mr. Stafford in his life-time, and still remains due upon the said mortgage. The Exchequer annuity, subject to the usual deductions, was regularly received, up to January 5th, 1818. William Stafford, by his will duly attested, bearing date 22nd

[*32]

October, 1777, gave all his real and personal estate whatsoever unto his wife, Alethea Maria Stafford, her heirs, executors, administrators, and assigns, and appointed her sole executrix thereof, and died in the year 1796, without issue. The said will was duly proved by his executrix on the 7th September, 1796. Alethea Maria Stafford, by her will, bearing date the 12th March, 1810, and attested by two witnesses, after directing that all her just debts, funeral and testamentary expenses, and the charges of proving her said will, should be in the first place paid; and after giving sundry pecuniary and specific legacies, and divers annuities to several persons, and several charitable institutions therein mentioned, bequeathed as follows; viz. "And all the rest, residue, and remainder of my personal estate, of what nature or kind soever, I give and bequeath the same, and every part thereof, unto John Aubin and Patrick Lewis, their executors, administrators, and assigns, upon trust, as soon as conveniently may be after my decease, to get in and convert into money all such parts of my estate as shall not consist of money, or of perpetual stocks or funds." And then, out of such monies, &c. to pay the several pecuniary legacies, and to provide sufficient funds for the payment of the several annuities and other *yearly payments, directed by her will to be made, and to set apart the annual sum of 200*l.*, to be paid for ever to the treasurer for the time being of the Thatched House Society, for the sole uses of that institution. And after directing similar appropriations for the benefit of other charities, she bequeathed all the residue of her said personal estate and effects to be divided equally between and for the benefit of three charities therein named, to be paid in equal proportions, for the benefit of the same respectively. And she appointed the said John Aubin and Patrick Lewis her executors. The testatrix died on the 29th September, 1810, and the said John Aubin and Patrick Lewis duly proved the said will. The Exchequer annuity, under an order of the Court of Chancery, made 17th February, 1817, in a cause of *Aubin v. Daly*, was sold to John Dearman Church, Esq., for the sum of 12,050*l.* The question for the opinion of this Court was, whether the legal estate and interest in the said Exchequer annuity of 1,000*l.* passed, by the will of Alethea

AUBIN
v.
DALY.

[*63

AUBIN
v.
DALY.

Maria Stafford, to John Aubin and Patrick Lewis, the executors named in the will.

Denman, for the plaintiff:

The question in this case is, whether this annuity duly passed by a will attested only by two witnesses. That depends on another question, whether this be personal or real property. In Co. Lit. 20 a, it is thus laid down: "And so it is if I, by my deed, for me and my heirs, grant an annuity to a man and the heirs of his body; for that this only chargeth my person, and concerneth no land, nor savoureth of the realtie." *Holderness v. Carmarthen*,† **Buckeridge v. Ingram*,‡ and *Earl of Stafford v. Buckley*,§ are authorities to the same effect; and in the last case, which is upon the very will now in dispute, Lord HARR-
[*64] WICKES decided this point on the authority cited from Co. Litt.

Richmond, *contra*:

It is not necessary here to deny the principles of law laid down by the other side. For, admitting that this will is sufficiently executed, still there is an ulterior question, viz. whether this annuity passes by the will. It must pass by one of two modes. Either it vests in the executors *virtute officii*, or by the residuary bequest to them. An annuity of this sort is thus defined by Lord COKE: || "And so it is if an annuitie be granted to a man and his heirs, it is a fee-simple personal." As such it will be descendible to his heirs. It was formerly doubted whether an annuity was assignable; but that doubt did not extend to annuities of inheritance. *Gerard v. Boden*,¶ *Baker v. Broke*.†† And in Brooke's Abr. tit. Annuities, pl. 39, it is thus laid down: "It was doubted if he who has an annuitie in fee may grant it over, for it is a chose in action; yet *per alios* it is an inheritance; and, therefore, it may well be granted over, and that without attornment, for it charges the person; and yet the defendant was charged as parson of a church. And a debt cannot descend to the heir, but an annuity of inheritance may descend to the

† 1 Bro. Ch. Ca. 377.

‡ 2 Ves. jun. 652.

§ 2 Ves. 170.

|| Co. Litt. 2 a.

¶ Hetley, 80.

†† Moore, 5.

heir ; therefore it is not merely personalty." And in Fitzh. Ab. tit. Release, pl. 48, "Release of all actions personal is a good bar in a writ of annuity, notwithstanding *he claim to him and his heirs ; and a release of actions real is also good, because it is mixt." And in *Holdernes v. Carmarthen*,† an annuity granted by the letters patent of King William and Queen Mary was considered on the same footing as an annuity of inheritance, and assignable. And the point was also discussed in *Priddy v. Rose*.‡ In *Nevil's* case,§ an annuity of inheritance was held forfeitable for treason by 26 Hen. VIII. c. 13. And in *The Earl of Stafford v. Buckley*, Lord HARDWICKE expressly says of this annuity, "All the rest of the personal estate that could pass to executors would go to them ; but this is a kind of personalty which, according to Doctor and Student, would not be assets in executors, and, consequently, will not go to them by being named executors." These authorities, therefore, shew that the executors did not take this annuity *virtute officii*. Then are the words in the bequest sufficient to give it to them ? The testatrix bequeaths all the rest, residue, and remainder of her personal estate, of what nature or kind soever, and every part thereof, unto J. A. and P. L., their executors, administrators, and assigns, upon certain trusts. Now, it is clear, by reference to Lord HARDWICKE's judgment, that he entertained considerable doubts whether this annuity would pass by a sweeping bequest of this nature. Suppose a will bequeathed all the testator's hereditaments to A., and all his personal estate to B. It seems clear that A. would take such an annuity as this, and the heir-at-law is not to be disinherited without express words, and that though general words are used. *Doe dem. Spearing v. Buckner*.||

AUBIN
v.
DALY.
[*65]

(BAYLEY, J.: There *the devise was followed by words shewing that the testator had only his personal estate in contemplation. The words of the trust in that case were very material, for the trustees were to add the interest to the principal, which shewed that there the testator was only speaking of his personal estate.)

[*65]

† 1 Bro. Ch. Ca. 376.

§ 7 Co. Rep. 124 b.

‡ 17 R. R. 24 (3 Meriv. 86).

|| 3 R. R. 278 (6 T. R. 610).

AUBIN
v.
DALY.

Where the residuary clause is in favour of executors, it was held, *Shaw v. Bull*,† that no more would pass by it than would go to executors *virtute officii*; and that is the case here. And the words “of what nature or kind soever” apply only to real and personal chattels, and do not extend to hereditaments. So, in *Rose v. Bartlett*,‡ a devise of all lands and tenements was held not to include terms for years. The Court, therefore, are not bound by the literal sense of general words. He also cited *Ex parte Sergison*,§ *Ex parte Morgan*,|| and *Silberschildt v. Schiott*.¶

(BAYLEY, J.: The argument would go the length of saying that property of this description could only pass by a special devise.)

Denman, in reply, contended, that it was clear that this annuity passed by the residuary clause in Mrs. Stafford’s will. Here there is nothing to restrain the general words of the devise. And the only question is, whether this is personal estate; whether it would pass to the executors *virtute officii* is a very different question from the present. This is the case of a specific bequest of the residue, and is quite sufficient to pass the annuity in question.

Cur. adv. vult.

[67]

The following Certificate was afterwards sent :

“ This case has been argued before us by counsel, and we are of opinion, that the legal estate and interest in the Exchequer annuity of 1,000*l.* passed by the will of Alethea Maria Stafford to John Aubin and Patrick Lewis, deceased.

“ C. ABBOTT.

“ J. BAYLEY.

“ G. S. HOLROYD.

“ W. D. BEST.”

† 12 Mod. 593.

‡ Cro. Car. 292.

§ 4 Ves. 147.

|| 10 Ves. 101.

¶ 3 V. & B. 45.

HAMMOND v. REID.†

(4 Barn. & Ald. 72—75.)

1820.
Nov. 17.

[72]

Policy of insurance from Para to New York, with leave to call at any of the Windward and Leeward islands on the passage, and to discharge, exchange, and take on board the whole or any part of any cargo at any ports or places, particularly at all or any of the Windward and Leeward islands, without being deemed any deviation: Held, on this policy, the ship having proceeded to two of the Leeward islands for a purpose wholly unconnected with the voyage, that it was a deviation, and vitiated the insurance.

ACTION on a policy of insurance on the ship *Arabella*, on a voyage at and from Para to New York, during her stay there, and at and from thence to Para, with leave to call at all or any of the Windward and Leeward islands and colonies on her passage to New York, with leave to discharge, exchange, and take on board the whole or any part of any cargo or cargoes at any ports or places she might call at or proceed to, particularly *at all or any of the Windward and Leeward islands, without being deemed any deviation from and without prejudice to the insurance. The declaration stated the sailing of the vessel on the voyage insured, and a loss by perils of the seas. Plea, general issue. At the trial, at the Lancaster Summer Assizes, 1819, before Bayley, J. a verdict was found for the plaintiff, subject to the opinion of the Court on a case, which stated, that the ship sailed from Para on the voyage insured with a cargo on board, bound for New York; but with orders from the plaintiff, her owner, to proceed in the first instance to Barbadoes, where the captain was directed to sell the cargo and receive other goods on board in exchange for it, and proceed from thence to New York, after calling at the islands of St. Bartholomew and St. Thomas, two of the Leeward islands, for the purposes after stated. When the vessel sailed from Para the plaintiff was there, and intended to proceed from thence in another vessel direct to New York, where he expected to meet a vessel, also belonging to himself, called the *Alice*, from Liverpool, which last-mentioned vessel he then proposed to load at New York with goods for the said islands of St. Bartholomew and

[*73]

† Distinguished by the decision of *Ins. Co. of Bombay* (1876) 1 Ex. Div. the C. A. in *Gambles v. Ocean Marine* 141; 45 L. J. Ex. 366.—R. C.

HAMMOND St. Thomas, and directed the captain of the *Arabella*, after
 REID. finishing his trading at Barbadoes, to proceed to St. Bartholomew
 and St. Thomas, for the purpose of obtaining information in
 regard to the state of the market, and on other subjects at those
 islands, with the view of forming his opinion upon the specula-
 tion he proposed to enter into by the said ship *Alice* from New
 York to those islands. The *Arabella* arrived at Barbadoes on the
 5th March, 1817, where she discharged her cargo, and received
 [*74] on board a quantity of sugar, with which she sailed for *New
 York on the 4th of April following, intending to call at St.
 Bartholomew's and St. Thomas's, two of the Leeward islands, in
 her way to New York. In the course of this voyage, after having
 passed the islands of St. Bartholomew and St. Thomas, she was
 lost off Savannah. When the ship sailed from Barbadoes on
 the 4th of April, her objects of trade were at an end until she
 should arrive at New York, and she proceeded to the islands of
 St. Bartholomew and St. Thomas only to obtain information for
 the purpose before stated.

Littledale, for the plaintiff, contended, that the going to the
 islands of St. Bartholomew and St. Thomas was no deviation.
 Here is an express leave given to touch at all or any of the
 Windward or Leeward islands. Under that liberty the vessel
 had a right to go to the islands in question. And, besides, the
 intelligence obtained there might probably have some effect on
 her ultimate destination.

F. Pollock, *contra*, after citing *Rucker v. Allnutt*,† and
Langhorn v. Allnutt,‡ was stopped by the Court.

ABBOTT, Ch. J. :

This calling at the islands of St. Bartholomew and St. Thomas
 was for a purpose wholly unconnected with the voyage in question.
 If, as it was said, the intelligence to be obtained there would be
 likely to have altered the destination of the ship, the question
 would be different. But the contrary is expressly stated in the
 case ; for it is stated that it had reference to some new adventure

† 13 R. R. 465 (15 East, 278).

‡ 13 R. R. 663 (4 Taunt. 511).

to be subsequently *undertaken in another vessel. I think, therefore, that this being a calling for a purpose entirely unconnected with the voyage was, notwithstanding the words in the policy, a deviation, and that the plaintiff is not entitled to recover.

HAMMOND
v.
REID.
[*75]

Per CURIAM :

Judgment for the defendant.

THE KING v. THE INHABITANTS OF THE TOWNSHIP OF HATFIELD.

(4 Barn. & Ald. 75—83.)

1820.
Nov. 18.
[75]

Where in an indictment against a township for non-repair of a road, the prescription stated and proved was, that its inhabitants had been immemorially used to repair all roads situate within it, which, but for such usage, would be repairable by the parish at large : Held, that this places the township in the situation of a parish, and that it is necessary for the defendants to shew by evidence some other persons in certainty who are liable, in order to deliver themselves from their liability to repair.

INDICTMENT against the defendants for non-repair of a highway. The first count alleged a prescription, that the defendants, from time immemorial, had repaired and been accustomed to repair, and of right ought to have repaired, and still of right ought to repair, as often as it should be necessary, such and so many of the common King's highways, situate within their township, as would otherwise, and but for such usage or prescription, be repairable by the inhabitants of the parish of Hatfield at large. The second count varied only in stating the prescription to be for the several and respective townships, &c. within the parish of Hatfield, to repair separately from each other the several roads situate within each township, &c. respectively. Plea, general issue. At the trial at the last York Assizes, before Bayley, J. a verdict for the Crown was found by the jury, subject to the opinion of this Court on a case, which stated, that the road, a part of which formed the subject of this indictment, was one *leading from Doncaster to Epworth, and other places in the county of Lincoln. Its course lay along a bank commonly

[*76]

THE KING
 THE INHAB-
 ITANTS OF
 HATFIELD.

called the Low Level Bank, elevated one or two feet above the adjacent country. It was bounded on one side by a large open drain, and on the other by fence ditches. This bank was made by the earth of the drain. By articles of agreement, dated 24th May, in the second year of the reign of Charles I., between that King and Cornelius Vermuyden, Esq., which recited that the King was seised in fee of Hatfield Chase and Ditch Marsh, and of divers manors and lands adjoining, and that certain lands, wastes, commons, and waste grounds, situate, lying, and being upon each side of the river Idle, and abutting on the rivers Dun and Ayre to the north, and the river Trent towards the south, being parcel of the said premises, and containing by estimation 60,000 acres or thereabouts, were subject to be surrounded and drowned with water in such manner that little or no benefit could be made thereof, unless special care were taken for innning and draining the same. The said articles contained an agreement on the part of Cornelius Vermuyden to drain these lands, in consideration of himself or his nominees having the fee-simple of one-third part of the lands when drained. In this agreement were the following clauses: "And it is further agreed, and his Majesty doth hereby declare, that the said Cornelius Vermuyden, and others the parties aforesaid, shall and may, at their wills and pleasures, and as to him or them shall be thought most necessary and expedient, cut, dig, and make or cause to be made, such and so many channels, watercourses, banks, highways, sosses, sluices, and other receptacles for water, and shall have for himself and his servants and workmen, *with carts and carriages fit and convenient, free ingress and regress for the perfecting and performance of the said works, and draining the lands and grounds aforesaid, without the let, denial, hindrance, or interruption of any person or persons whatsoever, and shall also have and take such quantity and proportion of earth, reed, and other things and materials within the said grounds for perfecting the said work as by him or them shall be thought necessary and useful, and shall also have for his and their use and uses, freely, without interruption, the benefit of all and singular channels, watercourses, and sluices, which are now already made or digged within the said lands or grounds, and

[*77]

the same to turn, change, or alter for the more necessary draining of the said grounds, and perfecting the said works, or as he or they shall think fit; and it is hereby further concluded and agreed, that if the said Cornelius Vermuyden, and other the parties and undertakers by him to be employed as aforesaid, shall have cause at any time or times to use any of the lands and grounds lying or being without the compass of the grounds hereby intended to be drained and laid dry as aforesaid, and not subject to surrounding for any passage of water or otherwise, then it shall and may be lawful to and for the said Cornelius Vermuyden, and other the parties aforesaid, to use the same, so far as shall be necessary, in and for the performance of the said works. The drainage having been partly executed in the 11th year of the reign of Charles I., 12,459 acres, being one-third part of the lands then drained, were, in pursuance of the above agreement, conveyed in fee to Sir Wm. Curteine and others, the nominees of Cornelius Vermuyden. The participants of the Level *of Hatfield Chase were the persons who were the owners of the lands subsequently conveyed, under the above articles, to Cornelius Vermuyden or his nominees. The road in question, which ran through these lands, had been, as far back as living memory went, repaired by the participants out of their general scots. These repairs were made by sand which was brought from a distance, and by throwing soil from the adjacent drains, when cleansed out by the participants, for the purposes of the drainage, sand being the usual material for the repairs of that road. The participants were not a corporation, nor was it ascertained at the trial who all the different individuals, composing that body, were, though the names of some were proved. No repairs were proved to have been done by the defendants upon the particular road indicted; but their prescriptive liability, as stated in the indictment, was proved. The question for the opinion of the Court was, whether the inhabitants of the township of Hatfield were liable to repair this road; and the Court were to be at liberty to make any presumption which they should think the jury ought to have made.

THE KING
v.
THE INHAB-
ITANTS OF
HATFIELD.

[*78]

THE KING
v.
THE INHAB-
ITANTS OF
HATFIELD.

Parke, contra. * * *

E. Alderson, in reply, was stopped by the Court.

[79]

[81]

ABBOTT, Ch. J. :

The prescription stated in this indictment, and which has been proved in evidence, is one which places the inhabitants of this township in the same situation as the inhabitants of a parish, as to their legal liability to the repair of roads locally situated within their district. This circumstance distinguishes the case from those where the prescription stated on the record applies only to the particular road indicted. Then the question is, whether, in this case, the defendants have, with any degree of certainty, shewn, that any other persons are liable to the burden. If the case had stopped with the repairs done by the participants, it would have been sufficient; but it does not; for we have the history of those participants stated in it, who are, it seems, the representatives of Cornelius Vermuyden, to whom King Charles the First assigned one-third of *certain Crown lands, then of little value, as a compensation for draining the whole. In pursuance of this agreement, the drain and bank were, in all probability, executed; and on the bank this road has since been made. I am, therefore, not at all satisfied that the road had any immemorial existence; and if so, that reduces the commencement of the repair, given in evidence, to the reign of Charles the First, which negatives any prescriptive liability on the part of these participants. I do not think, therefore, that the defendants have established, that the participants are liable, *ratione tenuræ*. And the circumstances seem also to me to negative their liability, by reason of inclosure. Upon the whole, I am of opinion, that there must be judgment for the Crown.

[*82]

BAYLEY, J. :

I am of the same opinion. The prescription stated in this indictment makes the township, for all legal purposes, as to repair of roads, a parish. Then, if so, these defendants are liable, unless they can throw the burden on some other persons.

I entirely agree with my LORD CHIEF JUSTICE, that, from the circumstances stated in this case, we cannot make the presumption, that this was an immemorial highway, or that the participants are liable to repair it, *ratione tenuræ*. The repairs done by them are either referable altogether to mistake, or to a disinclination, on their part, to throw the burden on the township.

THE KING
v.
THE INHAB-
ITANTS OF
HATFIELD.

HOLROYD, J. :

In this case the township is, by the prescription, placed on the same footing as a parish, both as to immemorial roads, and also as to any new highways which may have been subsequently made; and, *therefore, whether the road indicted be an immemorial highway or not, the defendants must repair it, unless they can shew with certainty some other persons who are liable. The usage to repair, proved at the trial, would have been conclusive against the participants, unless there had been evidence to rebut it. That evidence, however, seems to me to be satisfactory. Here the wastes and commons originally surrounded by rivers were drained, and one-third part of them was allotted as a reward to Vermuyden, for the drainage. This formed a new division, which had not existed before, and the repairs proved are only co-extensive with that new division. It seems to me, therefore, to follow, as a very strong presumption, that the usage to repair could not have had any existence, previously to the drainage, but commenced at that time; for if it had commenced before, in all probability other lands, as well as those of the participants, would have also been chargeable. I think, therefore, that the defendants have failed in making out, that the participants are liable, *ratione tenuræ*. As to their liability, *ratione clausuræ*, it appears on the evidence, that the road was contemporaneous with the inclosure. But if it were clear, that the fence ditches were made at a subsequent period, still that would not make the participants, as a body, liable, but only those persons who actually made and continued the inclosure; and we have no evidence to shew who those persons were, or that they ever repaired the road. I am, therefore, of opinion, that there must be judgment for the Crown.

[*83]

THE KING BEST, J. having been absent in the Bail Court, during the
 THE INHAB-^{r.} argument, gave no opinion.
 ITANTS OF
 HATFIELD.

Judgment for the Crown.

R. v. BURDETT.

(4 Barn. & Ald. 95—184.)

[The report taken from this place will be found with the report in 3 B. & Ald, at p. 541, *ante.*]

1820.
 Nov. 20.

THE KING v. THE JUSTICES OF THE COUNTY OF
 CARNARVON.

(4 Barn. & Ald. 86—88.)

The Court of K. B. has no jurisdiction to review the judgment of the Quarter Sessions, except on a case sent up for their consideration; and, therefore, where the Sessions, having heard the witnesses on one side, had refused to hear those on the other side in an appeal, on the ground that their testimony had been prefaced by observations on the part of the advocate contrary to their usual practice, the Court refused to grant a mandamus to rehear the appeal.

D'O'LY, Serjt. moved for a rule *nisi* for a mandamus, to be directed to the justices of Carnarvonshire, commanding them to enter continuances, and re-hear an appeal between two parishes, touching the settlement of a pauper. It appeared from the affidavits, that the appeal came on at the sessions on the 14th of July last, and that the appellants having admitted a *prima facie* settlement in this parish, relied upon the proof of a case of a subsequently acquired settlement elsewhere. Having finished their case, the attorney for *the respondents proceeded to make observations upon the case proved by the appellants, and then offered to call witnesses to contradict it; but the Sessions refused to allow those witnesses to be called, on the ground that he had rested his case on his argument as to the insufficiency of the case proved on the other side; and thereupon they quashed the order of removal. The affidavits further stated, that the course pursued by the attorney for the respondents was the usual and ordinary practice of the sessions. *D'O'ly*, in support of the motion, contended, that the refusal on the part of the Sessions to

[86]

[*87]

hear the witnesses was in fact a refusal to hear the appeal altogether, in which case it was every day's practice for this Court to direct the Sessions by mandamus to hear and decide the question.

THE KING
v.
THE
JUSTICES OF
CAMBRIDGE.

BAYLEY, J. :

There is no instance, I believe, which can be found where this Court have interfered by mandamus to direct the justices to re-hear an appeal which they have once already heard. In this case they entered into the consideration of this appeal; and, after having heard it, they have decided that the respondents ought not to be allowed to call witnesses in reply. It is possible that in that decision they may have been wrong; but it seems to me that we are not at liberty to enter into that question, as no case has been sent up for our consideration. If we were to do so, we should constitute this Court a Court of Appeal from the Quarter Sessions, and we should have applications continually made to us to overturn their determinations, on the ground of the improper reception or rejection of evidence, and be called upon to review their judgment, although no case has been sent to us for that purpose. *It is the duty of Sessions to hear and decide; and, if they entertain any doubts, to submit them to this Court; but where they do not desire our interference, we have no jurisdiction.

[*88]

HOLBOYD, J. :

If it had appeared in this case that the Sessions had heard one side, and had altogether refused to hear the other, I should have thought it the same as if the case had not been heard at all, and I should then have been of opinion that this mandamus ought to issue; but, in this case, it appears to me that this was merely a question as to the practice of the Sessions, who have determined that the evidence tendered ought not to have been introduced with observations on the part of the advocate. I think, therefore, that this Court has no jurisdiction to interfere in such a case.

BEST, J.† concurred.

Rule refused.

† ABBOTT, Ch. J. had left the Court.

1820.
April 26

[4]

C. P. EASTER TERM.

CROMACK v. HEATHCOTE, Esq.

(2 Brod. & Bing. 4—6; S. C. 4 Moore, 357.)

The privilege of professional communications between solicitor and client is not confined to communications made in the course of a suit.†

TRESPASS against the sheriff for seizing goods under an execution. The defence set up was, that the goods had been conveyed by the father (against whom the execution issued) under a fraudulent assignment to the son. To prove the fraud, the defendant proposed, among other evidence, to call Smith, an attorney, to whom the father had applied to draw the assignment, and who had refused to draw it, knowing that an execution had been issued against the father. This attorney was not employed in the cause, and did not draw the assignment. RICHARDS, C. B. before whom the cause was tried at the last Hertfordshire Assizes, rejected this evidence, on the ground that it was a confidential communication made to an attorney. The jury found a verdict for the plaintiff.

Taddy, Serjt. now moved to set aside this verdict and have a new trial, on the ground (among other objections) that this evidence had been improperly rejected. He contended, that the rule, as to the exclusion of the evidence of solicitors touching matters on which they had been consulted, extends only to communications made in the *progress of a cause; and urged that a solicitor had been examined touching a dissolution of partnership,‡ and to prove the usurious consideration of a deed

[*5]

† See *R. v. Cox* (1884) 14 Q. B. D. 153, 173; 54 L. J. M. C. 41, 49, *per Cur.*, showing that the case is of authority only to this extent. There is no privilege to conceal frauds, and on

that ground the evidence ought to have been admitted.—F. P.

‡ The reporters are indebted to the kindness of a gentleman at the Bar, who was present at the time

he had drawn, *Duffin v. Smith*;† and that Lord KENYON seemed to confine the rule to communications made in the conduct of a cause, *Cobden v. Kendrick*.‡ He cited also *Wilson v. Rastall*,§ and *Du Barré v. Livette*.||

CROMACK
v.
HEATHCOTE

DALLAS, Ch. J. :

The plaintiff came to employ Smith as an attorney, though Smith happened to refuse the employment. The enquiry made by Lord KENYON in *Wilson v. Rastall* is, whether the party was, as he *stated, consulted professionally; and is not this a consulting on professional business? One is staggered at first on being told that there are decided cases which seem at variance with first principles the most clearly established; but the cases cited do not at all bear out the proposition contended for, and I know of no such distinction as that arising from the attorney being employed or not employed in the cause. To confine ourselves to the present case: here is a client who goes to give instructions touching a deed, and the communication must be deemed confidential, as between attorney and client, though the

[*6]

of the decision, for the following note :

WADSWORTH v. HAMSHAW AND
ASPINAL.

IN an action against the defendants for goods sold and delivered, the question was, whether the defendants were partners at the time the goods were delivered. On the part of the plaintiff, Hughes, an attorney, stated that the defendants had called upon him to advise them professionally, respecting the dissolution of their partnership. *Gurney and Merewether* objected to the admissibility of this evidence, upon the ground that what passed between Hughes and the defendants was a professional communication.

ABBOTT, Ch. J. without calling upon *Scarlett*, who was on the other side, ruled, that the evidence was admissible; that the communication

was not privileged; and that protection was only extended to those communications with an attorney which related to a cause existing at the time of the communication, or then about to be commenced. His Lordship then cited a case of an action for bribery, tried on the Midland circuit, (and attended by Serjts. *Adair* and *Wilson*,) in which the attorney for the defendant was called to prove some communication with his client. The evidence being objected to by the defendant's counsel, was rejected; but upon an application to the Court, a new trial was granted; and the Court then decided that no professional communication was protected except such as related to a cause.

† 1 Peake, 146.

‡ 2 R. R. 424 (4 T. R. 431).

§ 2 R. R. 515 (4 T. R. 753).

|| 3 R. R. 655 (1 Peake, 108).

1819.
March 1.

ABBOTT,
Ch. J.
[5, n.]

CROMACK
v.
HEATHCOTE. attorney happens to refuse the employment. I have no manner of doubt on the subject; and it might be of most mischievous consequence if, by granting a rule, we should be supposed to have cast any doubt on it.

BURBROUGH, J. :

It would be most mischievous if it were once doubted whether or no a communication such as this were confidential as between attorney and client.

RICHARDSON, J. :

Suppose the case of an attorney consulted on the title to an estate, where there was a defect in the title, can it be contended that he would ever be at liberty to divulge the flaw? I never heard of the rule being confined to attornies employed in a cause. I am of opinion, that the communication in this case was of a nature not to be divulged by the attorney to whom it was made.

Rule refused.

HOLLIS SOLLY AND SAMUEL SOLLY v. JOHN
MURRAY FORBES AND ABRAHAM FREDERIC
DANIEL ELLERMAN.†

1820.
May 15.

[38]

(2 Brod. & Bing. 38—50; S. C. 4 Moore, 448.)

A release was given by plaintiffs to A., one of two partners, with a provision that it should not prejudice any claims which plaintiffs might have against B., the other partner; and that in order to enforce the claims against B., it should be lawful for plaintiffs to sue A., either jointly with B. or separately. In an action by plaintiffs against A. and B., this release having been pleaded by A. and set out on oyer in the replication, with an averment that the action was prosecuted against A. jointly with B., for the purpose of enabling plaintiffs to recover payment of monies due from B. and A. to plaintiffs, either out of the joint estate of B. and A., or from B. or his separate estate, the replication was demurred to, and the demurrer overruled.

DECLARATION for money paid by the plaintiffs to the use of defendants, for money lent, for money had and received by the defendants to the use of the plaintiffs, for work done and labour performed by the plaintiffs as agents to defendants, for interest upon monies lent by the plaintiffs to the defendants, and upon an account stated between the defendants and the plaintiffs.

Pleas; by Forbes, general issue; *similiter* thereon. By Ellerman, general issue, a release, and a set-off. The replication craved oyer of the supposed release, which was set forth *verbatim*, and which was in substance an indenture dated 20th May, 1819, between the plaintiffs, both of the city of London, merchants and co-partners in trade, of the one part, and Abraham Frederick Daniel Ellerman, late of Hamburgh, merchant, but then residing and carrying on trade in Heligoland, of the other part, by which indenture (after reciting that, up to the year 1806, Ellerman carried on the trade or business of a merchant at Hamburgh, and also at Toningen, in partnership with John Murray Forbes under the firm, at each of the last-mentioned places, of Forbes and

† This decision has been referred to as a leading authority in cases where a surety is released, reserving rights against the principal: *Green v. Wynn* (1868) L. R. 7 Eq. 28, at p. 32, per GIFFARD, V.-C. (affd. 4 Ch. 204); *Buteon v. Gosling* (1871)

L. R. 7 C. P. 9, 12; 41 L. J. C. P. 53, 57, per WILLES, J.; and see per Lord HATHERLEY, C. in *Oriental Corporation v. Overend, Gurney & Co.* (1871) L. R. 7 Ch. at p. 150; 41 L. J. Ch. 334 (affd. L. R. 7 H. L. 348.).—R. C.

SOLLY
v.
FORBES.
[*39]

Ellerman, and that there were various transactions of business between *Forbes and Ellerman, and the plaintiffs; and that in or about the month of March, 1806, Forbes and Ellerman, having become embarrassed in their affairs, stopped payment, and that upon the balance of accounts between Forbes and Ellerman and the plaintiffs, Forbes and Ellerman stood justly indebted unto the plaintiffs, as co-partners in trade, in a considerable sum of money, the whole of which debt still remained unpaid and was then due and owing from Forbes and Ellerman to the plaintiffs; and that Ellerman had lately offered and proposed to the plaintiffs to pay to them in the manner thereafter mentioned the sum of 3,000*l.*, if the plaintiffs would give and execute unto Ellerman such release or discharge for or in respect of their aforesaid debt or demand on Forbes and Ellerman as thereafter was contained;) it was witnessed, that in consideration of 600*l.* to the plaintiffs in hand paid by Ellerman immediately before the execution of those presents, the receipt whereof the plaintiffs did thereby jointly and severally acknowledge, and also in consideration of twenty-four promissory notes of Ellerman, each for 100*l.* and each bearing date the 1st April, 1809, and which twenty-four promissory notes were made payable to the plaintiffs or their order successively, at one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, and twenty-four months date, (each of the said notes being numbered, and the number of each note corresponding with the number of months it had to run,) the receipt of which said twenty-four promissory notes (amounting together with the said sum of 600*l.* to the before-mentioned sum of 3,000*l.* so agreed to be paid to and accepted by the plaintiffs) the plaintiffs did also thereby acknowledge; and pursuant to and in execution of the agreement thereinbefore recited on the part of the plaintiffs, the plaintiffs had, and each of them had, remised, released, *and for ever discharged, and by those presents did and each of them did, remise, release, and for ever discharge Ellerman, his executors, administrators, and assigns, of, from, and against all and all manner of actions and suits, cause and causes of action or suit, debt, sum and sums of money, accounts, bonds, bills, notes,

[*40]

contracts, agreements, promises, damages, claims and demands whatever, in law and in equity, which the plaintiffs then had, or which they, or either of them, their, or either of their executors, administrators, or assigns, thereafter could, should, or might have against Ellerman, his executors, administrators, or assigns, for or by reason of any matter, cause, or thing whatsoever, relating to the premises, from the beginning of the world, to the day of the date of those presents, except, and subject nevertheless to the provisoes, declarations, or agreements thereafter contained. Provided always, nevertheless, and it was thereby agreed and declared by and between the parties to those presents, and the true intent and meaning of them and of those presents was, that those presents or any matter or thing therein contained should not release, or be construed and taken to release, or in any manner to prejudice and affect any claims or demands which the plaintiffs, or either of them, ever had, or then had, or which they, or either of them, or either of their executors, or administrators, thereafter could, should, or might have upon or against Forbes, either separately, or as a partner with Ellerman, or the executors, administrators, or assigns of Forbes, or upon or against the joint estate or effects of Forbes and Ellerman, in respect of the debt so due from Forbes and Ellerman to the plaintiffs, or any part of such joint estate, or effects, whether the same should be in the hands of or recoverable from Forbes and Ellerman, or either of them, or any other person or persons whomsoever. Provided also, nevertheless, and it was *thereby declared and agreed by and between the parties to those presents, and the true intent and meaning of them and of those presents was, that it should and might be lawful to and for the plaintiffs, their executors, administrators or assigns, from time to time, when and as they, the plaintiffs, their executors, administrators, or assigns, should be thereto advised, to commence and prosecute any actions, suits, or other proceedings, either at law or in equity, against Ellerman jointly with Forbes, or against Ellerman, his executors, administrators, and assigns, separately, for the purpose of recovering, or compelling, or of enabling the plaintiffs, their executors, administrators or assigns, to recover or compel payment, or satisfaction of the debt, so due

SOLLY
v.
FORBES.

[*41]

SOLLY
v.
FORBES.

[*42]

and owing from Forbes and Ellerman, to the plaintiffs as aforesaid, either by or out of any the joint estate or effects of Forbes and Ellerman, or by or from Forbes, his executors, administrators, or assigns, or his separate estate or effects. Provided always, nevertheless, and it was thereby lastly declared and agreed by and between the parties to those presents, and the true intent and meaning of them and of those presents was, that in case default should be made in the due payment of any two of the before mentioned promissory notes, successively to fall due, in such manner as that any two of the promissory notes should be due and unpaid at the same time, then and in such case those presents, and every matter and thing therein contained, should, from and immediately after such default, be absolutely void and of no effect, and the said sum of 600*l.*, and all or any other sums or sum of money, which might at that time have been paid, and also all or any other sums or sum of money which might at any time or times from and after such default, be paid, in discharge of any of the aforesaid promissory notes, should be carried to the credit of Forbes and Ellerman with the plaintiffs, and all the *rights, claims and demands of the plaintiffs, their executors, administrators, or assigns, by reason or in respect of the debt thereinbefore mentioned to be due to them from Forbes and Ellerman, either upon or against Forbes and Ellerman, jointly or separately, their or either of their executors, administrators, or assigns, or any other persons or parties whomsoever, should from and immediately after such default be in full force and virtue (as to so much of the debt so due to the plaintiffs as aforesaid, as should remain unpaid), in like manner, to all intents, effects, constructions, and purposes, as if those presents had never been made, anything therein contained to the contrary thereof in anywise, notwithstanding. In witness whereof, &c. A memorandum of which the following is the substance was then added, " This deed is deposited by S. Solly and H. Solly (the plaintiffs) and by G. B. on the part of Ellerman, with E. L., who is to deliver it to Ellerman, his executors or administrators, or his or their order, after due payment of the within mentioned twenty-four promissory notes, according to the tenor and meaning of the within written indenture, but in case

SOLLY
v.
FORBES.

of any default in payment of the promissory notes, or any of them, according to the tenor and meaning of the within written indenture E. L. is to deliver up the indenture to S. Solly and H. Solly, their executors or administrators, to be cancelled, and in the mean time the indenture is to remain in the hands of E. L. for the purposes aforesaid." The replication then concluded thus, "Which being read and heard the plaintiffs say that by reason of anything by the defendant Ellerman in his plea alleged, they ought not to be barred from having their aforesaid action thereof against him because they say that Forbes, with whom the defendant Ellerman is jointly sued in this action, and the said Forbes in the said supposed writing of release mentioned, are one and the *same person, and not other or different persons, and that the said Forbes is so sued as aforesaid, as a partner with the said Ellerman in respect of a certain part of the monies, in the said supposed writing of release mentioned to be due and owing from the said Forbes and the said Ellerman to the plaintiffs, to wit, at, &c. And the plaintiffs further say, that this action is prosecuted against the said Ellerman jointly with Forbes for the purpose of recovering or compelling, or of enabling the plaintiffs to recover or compel payment or satisfaction of the monies so due and owing from the said Forbes and the said Ellerman to the plaintiffs as aforesaid, either by or out of the joint estate or effects of the said Forbes and the said Ellerman, or by or from the said Forbes, or his separate estate or effects, to wit, at, &c. And this, &c. Wherefore, &c." As to the set-off, the plaintiffs replied that they were not indebted to the defendant Ellerman in manner and form alleged, and as to that, put themselves on the country. *Similiter* thereon.

[43]

Demurrer, and joinder in demurrer.

[After argument, the Court took time for consideration.]

DALLAS, Ch. J. now delivered the judgment of the Court :

[46]

The circumstances under which this case comes before the Court will appear by referring to the pleadings at large. The general question which arises is, whether the release as set forth

SOLLY
v.
FORBES.
[*47]

constituted a bar to the *action. Of the intention of the parties no doubt can be entertained. It was meant to release Ellerman as to person and effects, but not Forbes; and, therefore, to retain against Ellerman every right and remedy necessary to enforce payment from Forbes. But so to construe the release as to make it a release of both, which it would be if no action could be brought against Forbes, because Ellerman could not be joined, would make it operate not to effectuate but to defeat the intent of the parties. As little doubt can exist upon the words made use of to effectuate the intent, as upon the intent itself. It is not an absolute and unqualified release, but in terms conditional and provisional, being made subject to an exception; such exception forming part of the same sentence with the words of release, and immediately connecting with and attaching upon them, and introductory to and followed up by a proviso, by which it is expressly declared, that nothing contained in the deed of release shall be taken to release, or in any way prejudice or affect any demands of the plaintiffs, either against the said John Murray Forbes separately, or as a partner with Ellerman. Now it would be to release and in every way to affect the demand against Forbes as partner with Ellerman, to give such operation to the release as in effect to make it a release to both, by making it a bar to an action, in which, for the recovery of a joint debt, both must be jointly sued. Nor does this even rest on negative though necessary construction, for, in a subsequent part of the deed, it is expressly provided and declared to be the true intent and meaning of the release, that it shall be lawful for the plaintiffs to commence and prosecute any action against the said Abraham Frederick Daniel Ellerman jointly with the said John Murray Forbes for the recovery of the joint debt due from them; and this is a joint action for the recovery of such debt, being, therefore, an action expressly and in direct terms authorised by the deed of release itself. [*48] *But against this, objections of a technical and artificial nature have been raised, and we have been referred to many cases, in which it has been held, that a saving or condition repugnant to the nature of the grant is void, and that the grant remains absolute and unqualified, the condition no way operating in restraint of the grant. It is not necessary to pursue

SOLLY
v.
FORBES.

these cases into their detail: they are all cases of notoriety, the law of which is not to be disputed, and the only question is upon their application. But with respect to them all I would observe, that in one of the cases cited at the Bar it was correctly stated, that the rule of construction in modern times has been more equitable than formerly; Courts looking rather to the intention of the parties than to the strict letter; not suffering the latter to defeat the former, but in certain cases of exception to which it is not now necessary to refer. Taking these cases, however, such as they are, the application sought to be established is altogether fallacious. It is assumed, that, wherever the word "release" is made use of, it must operate absolutely and unconditionally, though immediately and in the same sentence followed by words, which shew it to be partial and particular only, and the general words being in no respect repugnant to the special words, but the latter a qualification merely of the former, leaving the release to operate to every purpose except to the exclusion of the particular purpose, which the parties have declared it to be their intention it shall not exclude. This being apparent, both in terms and meaning, what are the rules of law which apply, narrowing them to the particular point? I pass over the general and leading principle, that the intent of the parties shall prevail as far as by law it may; and further, that Courts will be anxious so to construe the law as to give effect to that intent, provided it do not contravene any fundamental rules of the policy of the law. If a deed can, therefore, operate two ways, one consistent with the intent and *the other repugnant to it, Courts will be ever astute so to construe it as to give effect to the intent; and the construction, I need not add, must be made on the entire deed. The passage cited at the Bar is to this effect material. "I exceedingly commend the Judges" (said Lord HOBART) "that are curious and almost subtil to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury which by rigid rules might be wrought out of the Act;† and it has been correctly added, that in the case of *Crossing v. Scudamore*,‡ Lord HALE cites and approves of the passage in Hobart, which is again referred to by WILLES, Ch. J. in the case

[*49]

† Hob. 277. *Earl of Clanrickard's case*.

‡ 1 Vent. 141.

SOLLY
v.
FORBES.

[*50]

in 2 Wilson,[†] and is cited to be approved of and to be governed by in many other cases. Not to go through all the authorities which are to be found, it will be sufficient to select one or two only, and these will refer to the rest. In *Morris v. Wilford*,[‡] it was expressly decided “that a release shall be construed according to the particular purpose for which it was made.” JONES, WYLD, and TWISDEN, JJ. were of opinion on the first argument, that the release is no bar notwithstanding the general words, for being made for particular purposes the general words are to be guided by the particular purposes. RAINSFORD, Ch. J. *contra*. The case was argued a third time, when by the whole Court judgment was given for the plaintiff. In *Payler and others v. Homersham*,[§] Lord ELLENBOROUGH adopts the position, that the general words of a release may be restrained by the particular recital. “Common sense” (said his Lordship) “requires that it should be so, and in order to construe any instrument truly you must have regard to all parts, and especially to the particular words of it.” The case in **Rolle* || to this effect, though said to have been denied by Lord HOLT to be law, “seems to me” (said Lord ELLENBOROUGH) “as sound a case as can be stated.” And Mr. Justice BAYLEY adds “there is no doubt but a particular recital in a deed will restrain the general words.”

On all these grounds, therefore, the apparent intent of the parties, sufficient words to effectuate that intent, the special nature of the release as formed by the very language in which the release itself is created, the matter, upon which it is to operate, and the known and established rules of construction to be collected from the authorities referred to, we are of opinion that this demurrer ought to be overruled. And in conclusion I will only say, that it is not intended to interfere with any received principles or established cases, but to decide only on this particular case with reference to its special nature, calling in aid former authorities only in the manner in which it has been endeavoured to apply them. But, for further caution, I will add, the decision of the Court only is, that the demurrer be overruled. It is not necessary now to say any thing as to any ulterior remedy

[†] *Doe d. Wilkinson v. Tranmer*, 2 Wils. 75.

[‡] 2 Show. 47.

[§] 16 R. R. 516 (4 M. & S. 423).

^{||} 2 Rolle's Abr. 409, line 43.

the defendant may have or suppose himself to have: In this respect he will act as he may be advised, and as circumstances may seem to require.

SOLLY
v.
FORBES.

Demurrer overruled accordingly.

BUCKLAND v. BUTTERFIELD AND ANOTHER.

(2 Brod. & Bing. 54—59; S. C. 4 Moore, 440.)

1820.
May 15.

[54]

A conservatory erected by tenant for years (who had a remainder for life, after the death of his lessor) on a brick foundation, attached to a dwelling-house, and communicating with it by windows opening into the conservatory and a flue passing into the parlour chimney, becomes part of the freehold, and cannot be removed by the tenant or his assignees.

ACTION on the case, in the nature of waste, by tenant for life, aged 70, against the assignees of her lessee from year to year, who had become bankrupt. *The bankrupt was the son of the plaintiff, and had also a remainder for life in the premises after her death. At Buckingham Lent Assizes, 1820, before Graham, B. the case proved was, that the defendants had taken away from the premises let to the bankrupt a conservatory and a pinery. The conservatory, which had been purchased by the bankrupt and brought from a distance, was by him erected on a brick foundation fifteen inches deep: upon that was bedded a sill, over which was frame work covered with slate; the frame work was eight or nine feet high at the end, and about two in front. This conservatory was attached to the dwelling-house by eight cantilevers let nine inches into the wall, which cantilevers supported the rafters of the conservatory. Resting on the cantilevers was a balcony with iron rails. The conservatory was constructed with sliding glasses, paved with Portland stone, and connected with the parlour chimney by a flue. Two windows were opened from the dwelling-house into the conservatory, one out of the dining-room, another out of the library. A folding-door was also opened into the balcony; so that when the conservatory was pulled down, that side of the house, to which it had been attached, became exposed to the weather. Surveyors who were called, stated that the house was worth 50*l.* a-year less after the

[*55]

BUCKLAND
v.
BUTTER-
FIELD. conservatory and pinery had been removed. The learned Judge having stated his opinion that the plaintiff ought to recover at least for the pinery and probably for the conservatory, the jury, estimating the plaintiff's life at six years' purchase, gave a verdict for her, 300*l.* damages.

[*56] *Peake*, Serjt. having obtained a rule *nisi* for a new trial, on the ground that this conservatory, though affixed to the freehold, was a matter of ornament, not beneficial to the premises, but lawfully removable by *the tenant, and that at all events the damages were excessive,

Blosset, Serjt. shewed cause against the rule :

This conservatory was not only affixed to the freehold, but actually formed a part of the dwelling-house, doors of communication having been made out of the sitting-room, so that, when the conservatory was pulled down, the adjoining part of the house was rendered uninhabitable, being entirely exposed to the inclemency of the atmosphere. In all the cases, not excepting those that relate to the removal of ornamental constructions or additions, it has been considered, among other things, whether the tenant placed them on the premises with a view to removal, or no. Here the party, though tenant from year to year, was entitled to the reversion after the death of his mother, to whom he was tenant, and he would never have made so costly an addition to his house as tenant from year to year, unless with a view to improve his reversionary interest. The damages, if estimated according to the tables set forth for life insurances by Act of Parliament, are perfectly fair ; the plaintiff's life being worth six years' purchase, and the damage done having deteriorated her property to the amount of 50*l.* a-year.

Peake, in support of his rule :

The conservatory was an erection merely for the purpose of ornament or pleasure ; it neither formed part of the habitation nor rendered it more convenient. So far from being certainly beneficial to the property or necessary to its occupation, it might render it of less value in the eyes of a succeeding tenant, as an

expensive and useless incumbrance. Whatever the law may be, with respect to parties who stand in other relations to each other, yet as between landlord and tenant, the tenant has a right to remove all ornamental erections which do not improve *the property for the purposes of occupation. *Beck v. Rebow*,† *Ex parte Quincy*,‡ *Lawton v. Lawton*,§ and *Elwes v. Maw*.|| In this latter case Lord ELLENBOROUGH considers all the decisions on the subject, and recognises the right of the tenant to remove things put up merely for ornament. In *Penton v. Robart*,¶ a greenhouse erected by a market gardener, was, by Lord KENYON, held to be removable. The mere fixation of a thing to the freehold cannot be the criterion by which we are to determine whether it is removable or not; for every large picture, chimney piece, or wainscot, must be in some manner so affixed. If the wall of the house has sustained an injury by the removal of the conservatory, that indeed may be the subject of action, the damages in which should be commensurate to the injury done to the house and to the money requisite to restore it to its original state, but ought not (as in the present case) to be calculated by the supposed diminution of annual value on account of the loss of that, which the tenant had a right to remove.

Cur. adv. vult.

DALLAS, Ch. J. now delivered the judgment of the Court :

This was an action on the case, tried before Graham, B. at the last Aylesbury Assizes. The question in the cause, as far as relates to the motion now before us, was, whether a conservatory affixed to the house in the manner specified in the report was so affixed as to be an annexation to the freehold and to make the removal of it waste? In *Elwes v. Maw* will be found at length all that can relate to this case and to all cases of a similar description. It is not necessary to go into the distinctions there pointed out as they relate to different classes of persons, or to the subject-matter itself of the *enquiry. Nothing will, here, depend on the relation in which the parties stood to each other, or the distinction

BUCKLAND
v.
BUTTER-
FIELD.

[*57]

† 1 P. Wms. 94.

‡ 1 Atk. 477.

§ 3 Atk. 13.

|| 6 R. R. 523 (3 East, 38).

¶ 6 R. R. 376 (2 East, 88).

[*58]

BUCKLAND
*.
BUTTER-
FIELD.

between trade and agriculture; for this is merely the case of an ornamental building constructed by the party for his pleasure, and the question of annexation arises on the facts reported to us; and I say the facts reported, because every case of this sort must depend on its special and peculiar circumstances. On the one hand it is clear, that many things of an ornamental nature may be in a degree affixed, and yet, during the term, may be removed; and, on the other hand, it is equally clear, that there may be that sort of fixing or annexation, which, though the building or thing annexed may have been merely for ornament, will yet make the removal of it waste. The general rule is, that where a lessee, having annexed a personal chattel to the freehold during his term, afterwards takes it away, it is waste. In the progress of time this rule has been relaxed, and many exceptions have been grafted upon it. One has been in favour of matters of ornament, as ornamental chimney pieces, pier glasses, hangings, wainscot fixed only by screws, and the like. Of all these it is to be observed, that they are exceptions only, and, therefore, though to be fairly considered, not to be extended; and with respect to one subject in particular, namely, wainscots, Lord HARDWICK treats it as a very strong case. Passing over all that relates to trade and agriculture as not connecting with the present subject, it will be only necessary to advert, as bearing upon it, to the doctrine of Lord KENYON in 2 East, 88,† referred to at the Bar. The case itself was that of a building for the purpose of trade, and standing, therefore, upon a different ground from the present, but it has been cited for the *dictum* of Lord KENYON, which seems to treat greenhouses and hothouses erected by great gardeners and nurserymen as not to be considered as annexed to the freehold. Even if the law were so, which *it is not necessary to examine, still, for obvious reasons, such a case would not be similar to the present: but in *Elwes v. Maw*, speaking of this *dictum*, Lord ELLENBOROUGH says, there exists no decided case, and, I believe, no recognised opinion or practice on either side of Westminster Hall to warrant such an extension. Allowing, then, that matters of ornament may or may not be removable and that whether they are so or not must depend on

[*59]

† *Lenton v. Robart*, 6 R. R. 376, 378 (2 East, 88, 90).

the particular case, we are of opinion that no case has extended the right to remove nearly so far as it would be extended if such right were to be established in the present instance under the facts of the report, to which it will be sufficient to refer; and, therefore, we agree with the learned Judge in thinking that the building in question must be considered as annexed to the freehold, and the removal of it consequently waste.

BUCKLAND
v.
BUTTER-
FIELD.

Rule discharged.

C. P. TRINITY TERM.

WILLIAM BROOKE, Esq. v. SAMUEL ENDERBY AND WILLIAM GILPIN.

(2 Brod. & Bing. 70—73; S. C. 4 Moore, 501.)

1820.
June 10.

[70]

The plaintiff carried on dealings in one general and unbroken account with A., one of the defendants, as his banker and army agent, from a period before 1807 up to 1819, when A. became bankrupt, and a balance was struck, none having been before struck since 1816. In 1807 defendant B. became a partner with A., and continued so till 1817, but the partnership was secret, and unknown to plaintiff till A.'s bankruptcy, defendant B. never interfering (to the knowledge of plaintiff) in the business carried on by A. At the expiration of the partnership in 1817 a balance was due from defendants to plaintiff: between the expiration of the partnership and A.'s bankruptcy, A. paid to plaintiff, and also received from plaintiff, several sums. In an action against the defendants for the balance due from them at the expiration of the partnership (A. having pleaded his bankruptcy and certificate): Held, that B. might consider the sums paid by A. to plaintiff after the expiration of the partnership, as paid in reduction of the balance due at the expiration of the partnership, and might take credit for them without giving credit for any sums received after the expiration of the partnership by A. on account of plaintiff.

THIS was an action of assumpsit for money lent, money paid, money had and received, and on an account stated. The defendant Enderby pleaded the general issue, and the defendant Gilpin, his certificate, under a commission of bankrupt, which was admitted by the plaintiff. The cause came on for trial at the London *sittings before Easter Term, when the jury found a verdict for the plaintiff for 339*l.* 17*s.* 5*d.* subject to the opinion

[*71]

BROOKS
v.
ENDERBY.

of the Court on the following case. The defendant Enderby became a partner with the defendant Gilpin in the several businesses of woollen draper, army clothier, and army agent, by indenture dated the 24th September, 1807, for the term of 10 years. Previous to the year 1807, the plaintiff, being a lieutenant-colonel in his Majesty's service, employed the defendant Gilpin as his agent, and continued to employ him as such until the bankruptcy of Gilpin on the 1st of April, 1819; during which time the plaintiff kept a running account with Gilpin; Gilpin, from time to time, receiving the pay and allowances, and also dividends due to the plaintiff on stock and other monies on his account, and from time to time making payments to him or his order: the plaintiff being in the habit of drawing upon Gilpin as his banker,† who from time to time furnished copies of the account to the plaintiff. Gilpin carried on business in his own name only, and Enderby never interfered with the business to the knowledge of the plaintiff, nor was he known or suspected by the plaintiff to be or have been a partner therein until after the bankruptcy of Gilpin on the 1st of April, 1819. The plaintiff and Gilpin continued to deal together after the 24th September, 1817,; down to the period of Gilpin's bankruptcy, in the same way, in which they had before dealt; and the account between them continued to be kept in the same way, no distinction being made as to the time before and after the 24th September, 1817; but the receipts and payments prior and subsequent to that period formed part of one general account. No rest was made or balance struck in the account after the 1st July, 1816, *down to the bankruptcy of Gilpin; and, during the existence of such account and dealings, there was, at all times, a considerable balance due to the plaintiff. No notice of the dissolution or expiration of the partnership between Gilpin and Enderby was given. The sum of 1,773*l.* 9*s.* 4*d.* was paid into Court by Enderby, and, in calculating the sum to be so paid into Court, Enderby sought credit for all sums paid by Gilpin to the plaintiff

[*72]

† The dealings and transactions here alluded to appeared by an account kept by Gilpin, a copy of which accompanied the case, and

was considered as part of it.

‡ On which day the partnership expired by the effluxion of time.

BROOKE
v.
ENDERBY.

after the 24th September, 1817, without giving credit for any sums received after that day by Gilpin on account of the plaintiff; which sums consisting of dividends on stock, &c. so received by Gilpin, on account of the plaintiff after the 24th September, 1817, amounted to 306*l.* 10*s.* 5*d.* The verdict was taken for the amount of such sums of money and interest calculated up to the 20th April, 1820. If the principle on which Enderby had calculated the sum paid into court were correct, it was admitted, on the part of the plaintiff, that the sum of 1,773*l.* 9*s.* 4*d.* paid into court by Enderby, covered and satisfied the whole of the plaintiff's demand upon him with interest thereon.

The question for the opinion of the Court on this special case was, whether the plaintiff was entitled to recover the sum of 333*l.* 17*s.* 5*d.* or any part thereof. If the Court were of opinion in the affirmative, then the verdict was to stand or be reduced as the Court should direct: otherwise a nonsuit was to be entered.

For the defendant, Enderby, it was contended at the trial, that the account between the plaintiff and Gilpin being one entire account, the payments made by Gilpin after the expiration of his partnership, not having been at the time appropriated to any particular debt by the plaintiff, must, especially as Gilpin acted as banker to the plaintiff, go in reduction of the old balance subsisting against Gilpin at the expiration of the partnership in 1817; while the expiration of the partnership precluded Enderby from being accountable for any receipts *by Gilpin subsequent to such expiration, and *Clayton's case*† was relied on.

[*73]

Hullock, Serjt. now endeavoured to distinguish *Clayton's case* from the present, arguing, that, in *Clayton's case*, the dealings were carried on by Clayton with the bank, after the death of one of the banking partners, with the knowledge of that circumstance; whereas, here, the plaintiff never knew that Enderby was a partner with Gilpin. He also contended that if the debtor did not, at the time of payment, appropriate the sum paid to any particular debt, the creditor might do so whenever an

† 15 R. R. 161 (1 Merivale, 572). R. R. 342 (2 B. & Ald. 45), and *Evans* See also *Bodenham v. Purchas*, 20 v. *Drummond*, 4 Esp. 89.

BROOKE
v.
ENDERBY.

event occurred which raised a different order of things between them : he cited *Newmarch v. Clay*.†

But the COURT thought the case not distinguishable in principle from *Clayton's* case, and gave

Judgment that a nonsuit be entered.

Bosanquet, Serjt. was to have argued for the defendant Enderby.

1820.
June 13.

TEAL v. AUTY AND DIBB.

(2 Brod. & Bing. 99—101; S. C. 4 Moore, 542.)

[99].

Defendants were sued for the price of some growing trees, which they had purchased, cut down, and carried away; a witness proved an admission by one of them that something was due, and a promise to pay. At the time of the bargain written memoranda had been made of the transaction; but these memoranda (one of them an item in a book of accounts), being neither stamped nor signed with the names of the parties, were not produced in evidence, and the plaintiff was nonsuited : Held, that the nonsuit was proper.

ASSUMPSIT for the price of some poles, which defendants had purchased when growing, and had afterwards cut and carried away. The declaration contained also a count upon an account stated. At the trial before Bayley, J. (York Spring Assizes, 1820), it appeared, that written memoranda had been made of the transaction at the time of the bargain. These memoranda (one of them an item in a book of accounts) being neither stamped nor signed with the names of the parties, were not produced in evidence. A witness stated that Auty, after the poles were carried away, admitted something to be due, and promised to pay. The learned Judge directed a nonsuit.

Hullock, Serjt. having obtained a rule *nisi* to set aside this nonsuit, and have a new trial,

Vaughan, Serjt. shewed cause against the rule :

The nonsuit was proper, because this transaction having been

accompanied with a writing, no parol evidence was admissible till that writing was produced : but the writing was inadmissible on two grounds ; first, as having no stamp ; secondly, as not containing the names of the parties to be charged ; which it ought to have done, pursuant to the Statute of Frauds, the growing trees being an interest in land. *Waddington v. Bristow*,† *Emmerson v. Heelis*,‡ *Crosby v. Wadsworth*.§

TRAL
v.
AUTY.

Hullock, in support of his rule :

It is not necessary for the plaintiff to impeach any of those cases. If a *parol contract, touching an interest in land, be not executed, the party cannot enforce it unless he have a memorandum in writing, signed by the person to be charged, as well as by himself : but where the contract is executed, such evidence of it is no longer necessary ; it is sufficient, if, as here, the purchaser has cut down his poles and carried them away. The plaintiff here, has established his claim by evidence *aliunde* and independent of the writing, and he is entitled to have at least a nominal verdict upon the evidence given as to the account stated : *Knowles v. Michell*.|| Then there was no agreement here, for the memorandum without signature does not constitute an agreement under the Statute of Frauds for any interest in land ; and, if the memorandum was no agreement, there could be no ground for stamping it.

[*100]

Sed per CURIAM :

The learned Judge who directed this nonsuit was perfectly right, and on that subject we feel no difficulty. But, adverting to the facts of this case, we find it to have been originally an agreement for the purchase of an interest in land, namely, growing poles ; if, therefore, an action had been brought to enforce such a contract, the objection that the memorandum attesting it was not signed by the parties and stamped, would have been well founded : here, however, there are other circumstances, and, whatever the original agreement might have been,

† 2 Bos. & P. 452.

‡ 11 R. R. 520 (2 Taunt. 38).

§ 8 R. R. 566 (6 East, 602 ; 2 Smith, 559).

|| 13 East, 249.

TEAL
v.
AUTY.

[*101]

the poles were taken away and the agreement was executed ; and if the plaintiff could have proved the amount due to him by any other evidence, there might have been no necessity for referring to the original agreement. We need not refer to a variety of cases, where upon an executed agreement the party has been entitled to recover, *although he could never have prevailed had the contract been contested before it was executed. Here it is contended that the plaintiff is entitled to recover upon the account stated ; but the witness called to prove that, did not speak to an admission of any definite amount, and in the case referred to, a promise for a precise sum was proved. The promise to pay in the present case was probably made with reference to the written memorandum, but that, not being stamped, could not be admitted in evidence. The difficulty, in this case, is to ascertain what was due ; and, in the absence of proof to such effect, the direction for a nonsuit was proper. However, under the circumstances of the case, we think the plaintiff ought to be permitted to go down to trial on payment of costs ; and, if on enquiry of the learned Judge who tried the cause, it should appear that the witness spoke to an admission of a definite sum, the plaintiff would be entitled to a verdict.

Adjournatur.

The COURT afterwards said that the learned Judge who tried the cause had no recollection of the admission of any definite sum being due, but they still thought that the plaintiff ought to have a new trial upon the terms above mentioned.

Rule for a new trial absolute, on payment of costs.

SAMUEL KNIGHTS, ADMINISTRATOR, v. FRANCIS
THOMAS QUARLES, GENT.†

(2 Brod. & Bing. 102—105; S. C. 4 Moore, 532)

1820.
June 14.

[102]

Plaintiff, as administrator, declared in assumpsit that defendant, for certain fees to be paid him by intestate, undertook as attorney to investigate and see that a title about to be conveyed to intestate was a good one: breach, that he omitted to do so, and that intestate in consequence took an insufficient title, whereby his personal estate was injured. Defendant having demurred, the demurrer was overruled.

ASSUMPSIT. The declaration stated that before the time of making the promise therein contained, and in the lifetime of the deceased, the deceased had contracted with one Savory for the purchase of certain premises at Thetford, which Savory assumed to have sufficient power and title to sell and convey to the deceased; and thereupon, in the lifetime of the deceased (in consideration of the premises, and that the deceased, at the special instance and request of the defendant, had retained and employed the defendant as his attorney and solicitor, to ascertain and investigate the title of Savory to the said premises, and to cause and procure the same, and a good title thereto, to be duly and effectually conveyed by Savory to the intestate as purchaser, for certain fees to be therefore paid by the intestate to the defendant), the defendant undertook and promised the deceased, in his lifetime, to perform and fulfil his duty in the premises. Breach, that although it was the duty of the defendant, by virtue of his retainer, to investigate carefully the title of Savory to the premises, and to take due and proper care that a bad title to the same should not be accepted by the deceased, yet the defendant, not regarding his duty in that behalf, but contriving and fraudulently intending, &c. did not nor would carefully investigate the title of Savory in the premises, or take due or proper care that a bad or insufficient title was not accepted and received by intestate, but on the contrary the defendant wholly neglected and refused to do so; and in the lifetime of the deceased the defendant, in violation of his promise *and undertaking, caused and procured, &c. the deceased, without his knowledge or consent, to accept and receive, and the said deceased in his lifetime did accordingly accept and receive from

[*103]

† See note, p. 661 below.

KNIGHTS
v.
QUARLES.

Savory a bad, defective, and insufficient title to the said premises; and thereupon such title was conveyed by Savory to the deceased in his lifetime, and the deceased paid Savory as the consideration-money in that behalf 2,000*l.*, by means of which the deceased, in his lifetime and until his death, held the premises on a bad and insufficient title, and was in his lifetime wholly unable to sell or dispose of the same. The count then alleged special damage to the deceased and his personal estate. The declaration contained other counts, varying the statement of the contract, in one of which counts the defendant was charged generally and not as an attorney. To these counts the money counts were added.

Demurrer and joinder.

Doyly, Serjt. for *Blosset*, Serjt. in support of the demurrer :

This action, though in form *ex contractu*, is in substance *ex delicto*, the breach of promise complained of being no more than a tort arising out of a neglect of duty. In proof of this, it may be observed that the action against parties for negligence or ignorance in a profession, has uniformly been conceived in case, and a plaintiff cannot by varying his form of action vary also his rights. Then it is clear that an action by the representatives of the deceased for a mere wrong committed against the deceased and unaccompanied with any breach of contract, does not lie, unless that wrong immediately affect his personal estate, *Lucy v. Levington*,† as, for instance, a conversion of goods in the lifetime of the deceased. If the law were otherwise, every case of deceit might be converted into an implied assumpsit, *and parties be enabled to sue in cases where it has been clearly held, that the action dies with the deceased. But, supposing that by a forced construction the duty of the defendant in this case could be called a contract; at all events it is an implied contract, and though an action will lie against an executor for breach of the express contract or covenant of his testator, the law has been considered otherwise with respect to an implied contract. This, too, is a contract regarding land, and the heir should have sued, not the administrator. The decla-

[*104]

† 2 Levinz, 26.

ration is defective in not alleging that it was the defendant's profession to ascertain the title of estates; and if it was not, he incurred no liability; for it was the plaintiff's folly to employ an incompetent person.

KNIGHTS
^{Q.}
 QUARLES.

The COURT stopped *Frere*, Serjt. who was to have argued for the plaintiff, expressing an unanimous opinion that there was no ground for the demurrer, an express promise being alleged, a breach of it in the lifetime of the intestate, and an injury to his personal property; the truth of which allegations was admitted by the demurrer; that it made no difference in this case whether the promise were express or implied, the whole transaction resting on a contract; that though, perhaps, the intestate might have brought case or assumpsit at his election, assumpsit being the only remedy for the administrator, it was very necessary the action should be maintained or the defendant might escape out of the consequences of his misconduct, and the intestate's estate suffer an irreparable injury. It was further observed, that if a man contracted for a safe conveyance by a coach, and sustained an injury by a fall, by which his means of improving his personal property were destroyed, and that property in consequence injured, though it was clear, he in his lifetime might at his election sue the coach proprietor in contract or in tort, it could not be doubted that his executor might *sue in assumpsit for the consequences of the coach proprietor's breach of contract.† That it could not be pretended that the contract of the defendant in this case was a contract running with the land; but if it were so, an action would lie by the administrator for a breach and damage incurred in the time of the testator; and as to the alleged omission of certain averments in the declaration, respecting the defendant's profession, at all events the admission of an express promise, implied by the demurrer, rendered any such allegation unnecessary.

[*105]

Judgment for the plaintiff.

† This reasoning followed in *Potter v. Met. Dist. Ry. Co.* (1874-5) 30 L. T. 765; 32 L. T. 36; and in *Bradshaw v. L. & Y. Ry. Co.* (1875) L. R. 10 C. P. 189, 194; 44 L. J. C. P. 148,

151; *Leggott v. G. N. Ry. Co.* (1876) 1 Q. B. D. 599, 45 L. J. Q. B. 557; otherwise where no contract, *Pulling v. G. E. Ry. Co.* (1882) 9 Q. B. D. 110, 51 L. J. Q. B. 453.—B. C.

1820.
June 17.
—
*Exchequer
Chamber.*
[130]

HOME *v.* LORD F. C. BENTINCK.

(2 Brod. & Bing. 130—164 ; S. C. 4 Moore, 563.)

[This case is reported from 8 Price, 130, p. 748, *post.*]

1820.
—
[156, n.]

ANDERSON *v.* HAMILTON.

(2 Brod. & Bing. 156, n.—157, n.)

[This also will be found with the report in 8 Price, p. 751, *n.*, *post.*]

(IN THE HOUSE OF LORDS.)

1820
—
[165]

JOSHUA ROWE, Esq. *v.* ISAAC YOUNG.

(2 Brod. & Bing. 165—283.)

[This case (the effect of which is now altered by statute) is reported in 21 R. R. 91, from the report in 2 Bligh, 391.]

1820.
Aug. 24.
—
[284]

THE QUEEN'S CASE.

Opinions given by the Judges, in answer to certain Questions of Evidence put to them by the Lords in the Course of the Proceedings against the QUEEN, and confirmed by the House.

(2 Brod. & Bing. 284—315.)

If a witness, without objecting to it, takes the oath in the usual form, he may be afterwards asked whether he thinks the oath binding upon his conscience ; but it is unnecessary and irrelevant to ask him if he considers any other form of oath more binding, and such question cannot be asked.

THE following question was proposed to the learned Judges by the House, and delivered to Abbott, Ch. J.

If a witness produced in the Courts below, without objecting to it, takes the oath according to the usual form, can he be asked whether he considers the oath he has taken as binding upon his conscience, and can he be also asked whether there are

other modes of swearing more binding upon his conscience than the oath he has taken ?

THE
QUEEN'S
CASE.

The Judges, after having retired for some time, returned the following answer, which was thus delivered by

ABBOTT, Ch. J. :

My Lords, the Judges have considered the question proposed to them by your Lordships, and they have taken the liberty to detain your Lordships while they sent for books, in order that they might consult the authorities referred to in the course of the argument before your Lordships. My Lords, the Judges are of opinion that the most correct and proper time for asking a witness whether the form in which the oath, as about to be administered to him, is one that will be binding upon his conscience, is before that oath is administered ; but, inasmuch as it may occasionally *happen that the oath will be administered in the usual form by the officer of the Court, before the attention of the Court, or party, or counsel is directed to it, we think that the party ought not to be precluded ; and, therefore, my Lords, in answer to your Lordships' first question, the Judges are of opinion that, although the witness produced in a Court of law shall have taken the oath in the usual form as therein administered, without making any objection to it, he may, nevertheless, be afterwards asked whether he considers the oath he has taken as binding upon his conscience. I am further to inform your Lordships, that the Judges are of opinion that, if the witness, in answer to that question, shall declare in the affirmative, namely, that he does consider the oath which he has taken as binding upon his conscience, he cannot then be further asked whether there be any other mode of swearing that would be more binding upon his conscience than that which has been used. Speaking for myself, not meaning thereby to pledge the other Judges, though I believe their sentiments concur with my own, your Lordships will allow me to speak in my own person. I conceive, that, if a witness says he considers the oath as binding upon his conscience, he does, in effect, affirm that, in taking that oath, he has called his God to witness, that what he

[*285]

THE
QUEEN'S
CASE.

shall say will be the truth, and that he has imprecated the Divine vengeance upon his head, if what he shall afterwards say is false; and, having done that, that it is perfectly unnecessary and irrelevant to ask any further questions.

[236]

1. It is not allowable, on cross-examination, in the statement of a question to a witness, to represent the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect, without having first shewn the witness the letter, and having asked him whether he wrote that letter.†

2. Two or three lines of a letter may be exhibited to a witness, without exhibiting to him the whole, and the witness may be asked whether he wrote the part exhibited.

3. But, if the witness deny that he wrote such part, he cannot be examined as to the contents of the letter.

Sept. 1.

The following questions were proposed to the learned Judges, and delivered to the Lord Chief Justice:

First, whether, in the Courts below, a party, on cross-examination, would be allowed to represent, in the statement of a question, the contents of a letter, and to ask the witness, whether the witness wrote a letter to any person with such contents, or contents to the like effect, without having first shewn to the witness the letter, and having asked that witness, whether the witness wrote that letter, and his admitting that he wrote such letter?

Secondly, whether, when a letter is produced in the Courts below, the Court would allow a witness to be asked, upon shewing the witness only a part of, or one or more lines of such letter and not the whole of it, whether he wrote such part or such one or more lines; and, in case the witness shall not admit that he did or did not write the same the witness can be examined to the contents of such letter?

The Judges, after having retired for a short time, returned the following answer:

ABBOTT, Ch. J.:

My Lords, the Judges have conferred upon the questions pro-

† See now 17 & 18 Vict. c. 125, s. 24; 28 & 29 Vict. c. 18, s. 5. The form of those enactments can hardly be understood without reference to

the present case and the reasons given. As to Ireland, see 19 & 20 Vict. c. 102, s. 27.—F. P.

pounded to them by your Lordships: the first question was in these words. [Here the LORD CHIEF JUSTICE recited the first question.]

THE
QUEEN'S
CASE.

The Judges are of opinion, that that question must be answered by them in the negative; and the reason and foundation of our opinion is shortly this. The contents of every written paper are, according to the ordinary and well-established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence; the proper course, therefore, my Lords, is to ask the witness, whether or no that letter is of the *handwriting of the witness? If the witness admits that it is of his or her handwriting, the cross-examining counsel may, at his proper season, read that letter as evidence, and, when the letter is produced, then, my Lords, the whole of the letter is made evidence. One of the reasons for the rule requiring the production of written instruments is, in order that the Court may be possessed of the whole. If the course, which is here proposed, should be followed, the cross-examining counsel may put the Court in possession only of a part of the contents of the written paper; and thus the Court may never be in possession of the whole, though it may happen that the whole, if produced, may have an effect very different from that which might be produced by a statement of a part.

[*287]

My Lords, the next question proposed by your Lordships, is: [Here the second question was stated.] The Judges beg your Lordships' permission to divide this question into two parts. In answer to the first part, namely, "Whether, when a letter is produced in the Courts below, the Court would allow a witness to be asked, upon shewing the witness only a part or one or more lines of such letter, and not the whole of it, whether he wrote such part?" The Judges are of opinion, that that question should be answered by them in the affirmative in that form; but, in answer to the latter part, which is this, "And in case the witness shall not admit that he did or did not write such part, whether he can be examined as to the contents of such letter?" the learned Judges answer in the negative, for the reason I have already given, namely, that the paper itself is to be produced, in order that the whole may be seen, and the one part explained by the other.

THE
QUEEN'S
CASE.

[*288]

The counsel were called in and informed, that, upon cross-examination, counsel cannot be allowed to represent in the statement of a question the contents of a letter, and to ask the witness whether the witness wrote *a letter to any person with such contents, or contents to the like effect, unless the letter is first shewn to the witness, and the witness is asked whether he wrote such letter, and admits that he did write it; and also, that the House will allow a witness to be asked, upon cross-examination, upon shewing such witness only a part, or one or more lines of such letter, and not the whole of it, whether he wrote such part, or such one or more lines. But, if the witness should not admit that he wrote such part, or such one or more lines, the witness cannot be examined to the effect of the contents of the letter, unless it is shewn to him, and he admits that he wrote it.

1. If, on cross-examination, a witness admits a letter to be of his handwriting, he cannot be questioned by counsel whether statements, such as the counsel may suggest, are contained in it, but the whole letter must be read in evidence.†

2. In the ordinary course of proceeding, such letter must be read as part of the cross-examining counsel's case. The Court, however, may permit it to be read at an earlier period, if the counsel suggest that he wishes to have the letter immediately read, in order to found certain questions upon it, considering it, however, as part of the evidence of the counsel proposing such a course, and subject to the consequences thereof.

Sept. 1.

The following question was proposed to the Judges :

Whether, when a witness is cross-examined, and, upon the production of a letter to the witness under cross-examination, the witness admits that he wrote that letter, the witness can be examined in the Courts below, whether he did not, in such letter, make statements such as the counsel shall, by questions addressed to the witness, enquire are or are not made therein; or whether the letter itself must be read as the evidence to manifest that such statements are or are not contained therein; and in what stage of the proceedings, according to the practice of the Courts below, such letter could be required by counsel to be read, or be permitted by the Court below to be read?

The Judges, after having retired for a short time, returned the following answer :

† See note, p. 664 above.

ABBOTT, Ch. J. :

THE
QUEEN'S
CASE.

[289]

My Lords, the Judges have conferred upon the questions last proposed to them by your Lordships: the first part of your Lordships' question is in these words: "Whether, when a witness is cross-examined, and, upon the production of a letter to the witness under cross-examination, the witness admits that he wrote that letter, the witness can be examined in the Courts below, whether he did or did not, in such letter, make statements such as the counsel shall, by questions addressed to the witness, enquire are or are not made therein; or whether the letter itself must be read as the evidence, to manifest, that such statements are or are not contained in the letter?" My Lords, in answer to this part of your Lordships' question, I am to inform your Lordships, that the Judges are of opinion, in the case propounded, that the counsel cannot, by questions addressed to the witness, enquire whether or no such statements are contained in the letter; but, that the letter itself must be read to manifest whether such statements are or are not contained in that letter. My Lords, in delivering this opinion to your Lordships, the Judges do not conceive that they are presuming to offer to your Lordships any new rule of evidence, now, for the first time, introduced by them; but, that they found their opinion upon what, in their judgment, is a rule of evidence as old as any part of the common law of England, namely, that the contents of a written instrument, if it be in existence, are to be proved by that instrument itself, and not by parol evidence. The latter part of your Lordships' question is, "In what stage of the proceedings, according to the practice of the Courts below, such letter could be required by counsel to be read or be permitted by the Court below to be read?" My Lords, in answer to this, I am to inform your Lordships, that the Judges are of opinion, according to the ordinary rule of proceeding *in the Courts below, the letter is to be read as the evidence of the cross-examining counsel, as part of his evidence in his turn, after he shall have opened his case; that that is the ordinary course; but that, if the counsel, who is cross-examining, suggests to the Court that he wishes to have the letter read immediately, in order that he may, after the contents of that letter shall have been made known to the Court,

[*290]

THE
QUEEN'S
CASE.

found certain questions upon the contents of that letter, to be propounded to the witness, which could not well or effectually be done without reading the letter itself, *that* becomes an excepted case in the Courts below, and, for the convenient administration of justice, the letter is permitted to be read at the suggestion of the counsel, but considering it, however, as part of the evidence of the counsel proposing it, and subject to all the consequences of having such letter considered as part of his evidence.

The counsel were called in, and were informed, that when a witness is cross-examined, and upon the production of a letter to the witness under cross-examination, the witness admits he wrote that letter, the witness cannot be examined, whether he did or did not, in such letter, make statements such as the counsel shall, by questions addressed to the witness, enquire are or are not made therein; but that the letter itself must be read as the evidence, to manifest that such statements are or are not contained therein; and, further, that it is the opinion of the House, that, in the regular course of proceeding, the letter ought to be read after the counsel cross-examining shall have opened his case; but that the House will, upon the request of such counsel, stating that it is expedient for the purpose of his more effectually, in the course of his cross-examination, propounding further questions necessary for the interest of his client, permit such letter to be read, subject to all the *consequences of having such letter considered as part of his evidence.

[*291]

Sept. 2.

The LORD CHANCELLOR, by leave of the House, stated, in their presence, that a reference having been made by the learned counsel for her Majesty, at the close of yesterday's proceedings, to the trial of the Duchess of Kingston, where it was stated that a letter had been presented to a witness (Judith Phillips) on cross-examination, and having been acknowledged by her to be her handwriting, had been afterwards read in evidence, *not* as part of the defendant's case. His Lordship had since referred to the printed trial, and had compared the statement contained

in that with the journals of their Lordships' House; and his Lordship read at length the proceedings touching the same, both as they appeared in the printed trial and upon the journals of the House: after which the counsel were informed, that, in the opinion of the House, the proceedings touching the said letter, as set forth in the printed trial, did not appear to establish, or destroy, or affect the opinion delivered by the learned Judges to the House yesterday; and that, according to the proceedings as they appeared upon the journals of the House, there was no statement whatever, there, to shew that the letter was ever read; therefore, the House was of opinion, in the present case, to adhere to the rule as laid down yesterday.

THE
QUEEN'S
CASE.

If, on cross-examination, it is proposed to ascertain of a witness whether he has made representations of any particular nature, immediately after being asked whether he made any representation he must be asked whether he made the representation by parol or in writing.

[292]

The following question was proposed to the Judges :

Sept. 5.

Whether, according to the established practice in the Courts below, counsel cross-examining are entitled, if the counsel on the other side object to it, to ask a witness whether he has made representations of a particular nature, not specifying in his question whether the question refers to representations in writing or in words ?

The Judges, after having retired for a short time, returned the following answer :

ABBOTT, Ch. J. :

My Lords, the Judges have conferred upon the question proposed to them by your Lordships. My Lords, the Judges find a difficulty to give a distinct answer to the question thus proposed by your Lordships, either in the affirmative or negative, inasmuch as we are not aware that there is, in the Courts below, any established practice which we can state to your Lordships as distinctly referring to such a question propounded by counsel on cross-examination, as is here contained; that is, whether the

THE
QUEEN'S
CASE.

[*293]

counsel cross-examining are entitled to ask the witness whether he has made such representation; for it is not in the recollection of any one of us that such a question, in those words, namely, "whether a witness has made such and such representation," has at any time been asked of a witness. Questions, however, of a similar nature are frequently asked at Nisi Prius, referring rather to contracts and agreements, or to supposed contracts and agreements, than to declarations of the witness; as, for instance, a witness is often asked, whether there is an agreement for a certain price for a certain article,—an agreement for a certain definite time,—a warranty,—or other matter of that kind, being a matter of contract; and, when a question *of that kind has been asked at Nisi Prius, the ordinary course has been for the counsel on the other side, not to object to the question as a question that could not properly be put, but to interpose, on his own behalf, another intermediate question; namely, to ask the witness whether the agreement referred to in the question originally proposed by the counsel on the other side, was or was not in writing; and, if the witness answers that it was in writing, then the enquiry is stopped, because the writing must be itself produced. My Lords, therefore, although we cannot answer your Lordships' question distinctly in the affirmative or the negative, for the reason I have given, namely, the want of an established practice referring to such a question by counsel; yet, as we are all of opinion that the witness cannot properly be asked, on cross-examination, whether he has written such a thing, (the proper course being to put the writing into his hands, and ask him whether it be his writing,) considering the question proposed to us by your Lordships, with reference to that principle of law which requires the writing itself to be produced, and with reference to the course that ordinarily takes place on questions relating to contracts or agreements, we, each of us, think, that if such a question were propounded before us at Nisi Prius, and objected to, we should direct the counsel to separate the question into its parts. My Lords, I find I have not expressed myself with the clearness I had wished, as to dividing the question into parts. I beg, therefore, to inform the House, that, by dividing the question into parts, I mean, that the counsel

would be directed to ask whether the representation had been made in writing or by words. If he should ask, whether it had been made in writing, the counsel on the other side would object to the question; if he should ask whether it had been made by words, that is, whether the witness had said so and so, *the counsel would undoubtedly have a right to put that question, and probably no objection would be made to it.

THE
QUEEN'S
CASE.

[*294]

The counsel were called in, and were informed, that if, on cross-examination, they enquired of a witness whether he had made representations of any particular nature, stating the nature of those representations, they must, in their enquiries, ask the witness, first, "whether he made the representations by parol or in writing."

The *Attorney-General* of the Queen enquired, whether he was to understand, before he had asked whether the witness made any representations, he was to ask whether it was in writing.

The counsel was informed that he might put the question, referring, in the mode of putting it, to a representation by parol; or, that where a question of that kind was put, the counsel on the other side was justified by the practice in breaking in upon the course of the cross-examination, so far as to put the question, whether the declaration, if made, was by parol or in writing.

If, on the trial of an action or indictment, a witness examined on the part of the plaintiff or prosecutor, upon cross-examination by defendant's counsel, states that at a time specified he told A. that he was one of the witnesses against the defendant, and being re-examined by the plaintiff's or prosecutor's counsel, states what induced him to mention this to A., the plaintiff's or prosecutor's counsel cannot further re-examine the witness as to such conversation, even as far only as it related to his being one of the witnesses: by eight Judges against one, (BEST, J. *dissentiente*,) and confirmed by the House.

The following questions were proposed to the Judges :

Sept. 6.

First, If, upon the trial of an action brought by A. (plaintiff) against B. (defendant), a witness examined on the part of the plaintiff, upon cross-examination by *the defendant's counsel, had stated, in answer to a question addressed to him by such

[*295]

THE
QUEEN'S
CASE.

counsel, that, at a time specified in his answer, he had told a person named C. D. that he was one of the witnesses against the defendant, and, being re-examined by the plaintiff's counsel, had stated what induced him to mention to C. D. what he had so told him, and the counsel of the plaintiff should propose further to re-examine him as to the conversation between him and C. D. which passed at the time specified in his former answer, as far only as such conversation related to his being one of the witnesses; would such counsel, according to the rules and practice observed in the Courts below, with respect to cross-examination and re-examination, be entitled so further to re-examine such witness; and, if so, would he be entitled so further to re-examine, as well with respect to such conversation relating to his being one of the witnesses against B. as passed between him and C. D. at the time specified after he had told him that he was to be one of the witnesses, as with respect to such conversation as passed before he had so told him?

Second, If, upon the trial of an indictment against A., a witness examined upon the part of the Crown had stated upon cross-examination by the counsel of A., in answer to a question addressed to him by such counsel, that, at a time specified in his answer, he had told a person named C. D. that he was one of the witnesses against A., and being re-examined by the counsel for the Crown, had stated what induced him to mention to C. D. what he had so told him, and the counsel for the Crown should propose further to re-examine him as to the conversation which passed between him and C. D. at the time specified in his former answer, as far only as such conversation related to his being one of the witnesses, would such counsel be entitled so further to re-examine him; and, if so, would he be entitled so *further to re-examine as well with respect to such conversation, relating to his being one of the witnesses against A., which passed between him and C. D. at the time specified after he had told him that he was to be one of the witnesses, as with respect to such conversation as passed before he had so told him?

[*296]

The Judges having retired, returned, after some time, when, the House being informed that the Judges differed in their

opinion as to the answer to be given to the questions proposed to them, they proceeded to deliver their opinions *seriatim*.

THE
QUEEN'S
CASE.

RICHARDSON, J. delivered his opinion upon both questions in the negative, and referred to the reasons to be delivered by the LORD CHIEF JUSTICE of the King's Bench.

BEST, J. delivered his opinion upon both questions in the affirmative, and gave his reasons.

GARROW, B., BURROUGH, J., HOLROYD, J., GRAHAM, B., RICHARDS, C. B. and DALLAS, Ch. J. severally delivered their opinion on both questions in the negative, and referred to the reasons to be delivered by the LORD CHIEF JUSTICE of the King's Bench. Then the LORD CHIEF JUSTICE of the King's Bench delivered his opinion upon both questions in the negative, and gave his reasons, in which he stated he was desired by the other Judges, except BEST, J. to say that they concurred.

ABBOTT, Ch. J. :

My Lords, I agree with the other Judges in considering the two questions proposed to us by your Lordships to be, with reference to the point on which our opinion has been asked, substantially one, *and that question, as proposed by the House, contains these words, "the witness being re-examined, had stated what induced him to mention to C. D. what he had so told him;" by which, I understand, that the witness had fully explained his whole motive and inducement to inform C. D. that he was to be one of the witnesses; and, so understanding the matter, and there being no ambiguity in the words, "I am to be one of the witnesses," I think there is no distinction to be made between the previous and subsequent parts of the conversation, and I think myself bound to answer your Lordships' question in the negative.

[*297]

I think the counsel has a right, upon re-examination, to ask all questions, which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and, also, of the motive, by which the witness was induced to use those

THE
QUEEN'S
CASE.

expressions ; but, I think, he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness. And, as many things may pass in one and the same conversation relating to the subject of the conversation (as, in the case put by your Lordships, the declaration of a witness that he was to be a witness in a cause or prosecution), which do not relate to his motive or to the meaning of his expressions, I think, the counsel is not entitled to re-examine to the conversation to the extent to which such conversation may relate to his being one of the witnesses, which is the point proposed in your Lordships' question to the Judges.

[*298]

And I distinguish between a conversation which a witness may have had with a party to the suit, whether criminal or civil, and a conversation with a third person. The conversations of a party to the suit, relative to the *subject-matter of the suit, are, in themselves, evidence against him in the suit, and, if a counsel chooses to ask a witness as to any thing which may have been said by an adverse party, the counsel for that party has a right to lay before the Court the whole which was said by his client in the same conversation ; not only so much as may explain or qualify the matter introduced by the previous examination, but, even matter not properly connected with the part introduced upon the previous examination, provided only, that it relate to the subject-matter of the suit ; because it would not be just to take part of a conversation as evidence against a party, without giving to the party, at the same time, the benefit of the entire residue of what he said on the same occasion. But the conversation of a witness with a third person is not in itself evidence in the suit against any party to the suit. It becomes evidence only as it may affect the character and credit of the witness, which may be affected by his antecedent declarations, and by the motive, under which he made them ; but, when once all which had constituted the motive and inducement, and all which may shew the meaning of the words and declarations has been laid before the Court, the Court becomes possessed of all which can affect the character or credit of the witness, and all beyond this is, in my opinion, irrelevant and incompetent. On

these grounds I feel called upon to answer your Lordships' question in the negative.

THE
QUEEN'S
CASE.

The counsel were called in, and were informed by the LORD CHANCELLOR, that the question which gave rise to the above discussion could not be put.

1. If a witness examined in chief on the part of the plaintiff, being asked whether he remembers a quarrel taking place between A. and B., answers, that he has heard of a quarrel between them, but does not know the cause of it, and such witness is not asked, upon his cross-examination, whether he has or has not made a declaration stated in the question touching the cause of the quarrel, the counsel for the defendant cannot, in order to prove such witness's knowledge of the cause of the quarrel, afterwards examine a witness to prove that the other witness has made such a declaration to him touching the cause of such quarrel.

[299]

2. If a witness examined in chief on the part of the plaintiff, being asked whether he remembers a quarrel taking place between A. and B., answers, that he does not remember it, and such witness is not asked, on his cross-examination, whether he has or has not made a declaration stated in the question respecting such quarrel, the counsel for the defendant cannot, in order to prove that such witness must remember the quarrel, afterwards examine a witness to prove that the other witness has made such a declaration.

The following questions were proposed by their Lordships to the learned Judges, and were delivered to the Lord Chief Justice.

Oct. 7

First, If, in the Courts below, a witness, examined in chief on the part of the plaintiff, being asked whether he remembered a quarrel taking place between A. and B., answered, that he heard of a quarrel between them, but he did not know the cause of it; and such witness was not asked, upon his cross-examination, whether he had or had not made a declaration stated in the question touching the cause of it; and, in the progress of the defence, the counsel for the defendant proposed to examine a witness to prove that the other witness had made such a declaration to him touching the cause of such quarrel, in order to prove his knowledge of the cause of the quarrel: according to the practice of the Courts below, would such proof be received?

Secondly, If, in the Courts below, a witness, examined in chief on the part of the plaintiff, being asked whether he remembered

THE
QUEEN'S
CASE.

[*300]

a quarrel taking place between A. and B., answered, that he did not remember it; and such witness was not asked on his cross-examination, whether he had or had not made a declaration stated in the question respecting such quarrel; and, in the progress of the defence, the counsel for the defendant proposed to examine a witness to prove, that the other witness had made such a declaration, in order *to prove that he must remember it: according to the practice of the Courts below, would such proof be received?

The Judges desired leave to withdraw, which they did; on their return,

ABBOTT, Ch. J. delivered the following answer to the House:

My Lords, the Judges have considered the questions proposed to them by your Lordships. One of those questions is in these words. [Here the LORD CHIEF JUSTICE read the first question.] The Judges are of opinion, my Lords, that this question must be answered by them in the negative. The question proposed to the witness, upon his cross-examination, is, do you remember? That question applies itself to the time of the examination; and many things may have taken place, and conversation may have been held upon them at one season by persons of the strictest honour and integrity, which may, at another season, be absent from their memory. It must be in the knowledge and experience of every man, that a slight hint or suggestion of some particular matter connected with a subject puts the faculties of the mind in motion, and raises up in the memory a long train of ideas connected with that subject; which, until that hint or suggestion was given, were wholly absent from it. For this reason, the proof that, at a time past, a witness has spoken on any subject, does not, in our opinion, lead to a legitimate conclusion that such witness, at the time of his examination, had that subject present in his memory; and to allow the proof of his former conversation to be adduced without first interrogating him as to that conversation, and reminding him of it, would, in many cases, have an unfair effect upon him and upon his credit, and would deprive him of that reasonable protection, which it is, in my opinion, the

THE
QUEEN'S
CASE.

[*301]

duty of every Court to afford to every person who appears *as a witness on the one side and on the other. According, therefore, to the practice of the Courts below, a witness is asked, on cross-examination, whether he has made a declaration or held a conversation; and, such previous question is considered as a necessary foundation for the contradictory evidence of the declaration or conversation to be adduced on the other side. I must, however, my Lords, take the liberty to add, that, in any grave or serious case, if the counsel had, on his cross-examination, omitted to lay the necessary foundation in the way in which I have mentioned, the Court would, of its own authority, call back the witness, in order to give the counsel an opportunity of laying the required foundation, by putting his questions to the witness, although the counsel had not before asked them: it being much better to permit the order and regularity of the proceedings as to time and season to be broke in upon, than to allow irrelevant or incompetent evidence to be received.

My Lords, this being the opinion of the Judges upon the question, which I have taken the liberty to read to the House, it will follow as a consequence, your Lordships will be aware, that to the other question, which applies itself to the witness's knowledge of a particular fact, the same answer in the negative must be given; and, in addition to the reasons with which I have troubled your Lordships on the first question, it may also be added, where the question proposed regards the witness's knowledge, that, although a witness may have mentioned a fact in ordinary conversation at a former period, it does not follow that he may have that which, in a court of law, can be considered as knowledge of the fact. A fact is often mentioned in conversation from the representation of others, without such a knowledge of it as can enable a person to say in a court of law, I know the fact.

1. If, on the trial of an indictment for any crime, evidence has been given upon the cross-examination of witnesses examined in chief in support of the indictment, from which it appears that A. B. (not examined as a witness) has been employed by the prosecutor as an agent to procure and examine evidence and witnesses in support of the indictment, the party indicted is not permitted to examine C. D. as a witness to prove that A. B. has offered a bribe to E. F. in order to

[302]

THE
QUEEN'S
CASE.

induce him to give testimony touching the matter in the indictment (E. F. not being a witness examined in support of the indictment, nor examined before it was so proposed to examine C. D.).

2. If, in the trial of an indictment for any crime, evidence has been given upon the cross-examination of witnesses examined in chief in support of the indictment, from which it appears that A. B. (not examined as a witness) has been employed by the prosecutor as an agent to procure and examine evidence and witnesses in support of the indictment, the party indicted is not permitted to examine G. H. as a witness to prove that A. B. has offered him a bribe, to induce him to bring to A. B. papers belonging to the party indicted (G. H. not having been examined as a witness in support of the indictment).

3. On a prosecution for a crime, the proof whereof is supposed to consist wholly or in part of evidence of a conspiracy entered into by the party then indicted, and under trial, so that the conspiracy is to be given in evidence against him,—general evidence of the existence of the conspiracy charged, may be received in the first instance, though it cannot affect such defendant, unless brought home to him or to an agent employed by him.

4. The same rule applies, if a defendant seeks by such general evidence, in the first instance, to affect the prosecutor with a conspiracy to suborn witnesses for the destruction of his defence, provided the proposed evidence be previously opened to the Court, as in the case of a prosecution to be proved by conspiracy.

Oct. 17.

The following questions were proposed to the learned Judges:

First, If, in the trial of an indictment for a capital offence, or any crime, evidence had been given, upon the cross-examination of witnesses examined in chief in support thereof, from which it appeared, A. B., not examined as a witness, had been employed, by the party preferring the indictment, as an agent to procure and examine evidence and witnesses in support of the indictment, and the party indicted should propose, in the course of the defence, to examine C. D. as a witness to prove, that A. B. had offered a bribe to E. F., in order to induce him to give testimony touching the matter in the indictment (E. F. not being a witness examined in support of the indictment, or examined before it was so proposed to examine C. D.): would the Courts below, according to their usage and practice, allow C. D. to be *examined for the purpose aforesaid; or could such witness, according to law be so examined, if the counsel employed in support of the prosecution objected to such examination?

Secondly, If, in the trial of an indictment for a capital offence

THE
QUEEN'S
CASE.

or other crime, evidence had been given, upon the cross-examination of witnesses examined in chief in support thereof, from which it appeared, that A. B., not examined as a witness, had been employed by the party preferring the indictment as an agent to procure and to examine evidence and witnesses in support of the indictment, and the party indicted should propose, in the course of the defence, to examine G. H. as a witness, to prove, that A. B. had offered him a bribe to induce him to bring to him papers belonging to the party indicted (G. H. not having been examined as a witness in support of the indictment) : would the Courts below, according to their usage and practice, allow G. H. to be examined for the purpose aforesaid ; or could such witness, according to law, be so examined, if the counsel employed in support of the prosecution objected to such examination ?

The learned Judges desired leave to withdraw, which they did ; and on their return, prayed for leave for further time to consider on these questions till the next day ; leave was granted accordingly ; and a third question was proposed to them, which, on the next day, was withdrawn, not being sufficiently clear ; and the following question proposed in its stead :

Supposing that, according to the rules of law, evidence of a conspiracy against a defendant for any indictable offence ought not to be admitted to convict or criminate him, unless as it may apply to himself or to an agent employed by him, may not general evidence, nevertheless, of the existence of the conspiracy charged *upon the record, be received in the first instance ; though it cannot affect such defendant, unless brought home to him, or to an agent employed by him ; and, whether the same rule would apply, if a defendant sought by such general evidence, in the first instance, to affect the prosecutor with a conspiracy to suborn witnesses for the destruction of his defence ?

[*304]

On this day ABBOTT, Ch. J. delivered the following answer to the House :

Oct. 18.

My Lords, the Judges conferred together for some time yesterday, upon the questions proposed to them by your Lordships,

THE
QUEEN'S
CASE.

and afterwards separated, in order to consider them apart, and met again early this morning, and again conferred together upon them. All of us then agreed in the answers to be given to the questions proposed to us; and I, having read to my learned brothers the writing, which I had prepared, as containing my own sentiments and answer, it was found, that they concurred therein; and I have their authority, with your Lordships' permission, to deliver what I had written (which your Lordships will observe is in the singular number, being originally prepared as my own alone), as containing and expressing their sentiments also.

[*305]

My Lords, the first question proposed by your Lordships is in these words. [Here his Lordship repeated the first question.] My Lords, the question thus proposed by your Lordships to the Judges, must be admitted by all persons to be a question of great importance, as it regards the administration of justice; and it is to me a question entirely new, and of very difficult solution. I have considered it with all the attention due to a question proposed by your Lordships, and with an anxiety proportioned to the importance of *the question itself; and it is not without much diffidence, that I now offer to your Lordships the result of my deliberation. Your Lordships will allow me here to interpose an observation, and to say, that the diffidence I felt at the moment of writing, has been considerably decreased by the knowledge I now have, that my opinion and sentiments have received the concurrence of my learned brothers.

The question must, as it appears to me, be considered in the same mode, and must receive the same answer, as if the parties were reversed: as if, instead of proof offered on the behalf of a defendant respecting the act of an agent employed by the prosecutor, it were proof offered in reply on the part of the prosecutor respecting the conduct of an agent employed by the accused to procure and examine evidence and witnesses in support of his defence. If such proof can be received on the part of a defendant, it must be received on the ground, that it may lead to a legitimate inference and conclusion, that the witnesses examined against him, although not appearing to have been called before the Court by any undue means, are, neverthe-

THE
QUEEN'S
CASE.

less, on this ground extraneous and foreign to them, not to be considered as the witnesses of truth. And, if such an inference and conclusion can be reasonably and legitimately drawn in favour of a defendant, in the case proposed by your Lordships, I am unable to discover any principle, upon which I may say, that the like conclusion may not be with equal reason drawn against him in the analogous case that I have taken the liberty to suggest; so that proof of this nature, if admissible, must be expected to lead as frequently to the condemnation of an innocent man by casting discredit upon his defence, as to the acquittal of such a person by disgracing the prosecution: and this consideration enables me to contemplate the question proposed with more calmness than I *should be able to view a question, of which the determination might possibly, by the exclusion of his evidence, lead to the condemnation of an innocent person; but could, in no case, produce the same consequence by the exclusion of evidence against him.

[*306]

The question proposed by your Lordships regards the act of "A person employed by the party preferring an indictment as an agent to procure and examine evidence and witnesses in support of the indictment;" and it regards the act of that agent addressed to a person not examined as a witness in support of the indictment, the offered proof not apparently connecting itself with any particular matter deposed by the witnesses, who have been examined in support of the indictment, and leaving, therefore, those witnesses unaffected by the proposed proof, otherwise than by way of inference and conclusion; and this question may be considered as it regards the prosecutor or party preferring the indictment, and as it regards the witnesses.

The prosecutor has, by the hypothesis, employed a person as an agent to procure and examine evidence and witnesses. This is a lawful employment necessary in many cases; in some meritorious, in none disgraceful or improper, if we look either to the employer or to the person employed; and, being a lawful employment, it is to be presumed, until the contrary be shewn, that the employer means and intends, that his agent shall execute it by lawful means: and as, according to the general rules and principles of law, a person is not to be affected in interest or

THE
QUEEN'S
CASE.

[*307]

fame by any act of another, although that other may have been in his employment or confidence as an agent or otherwise (excepting such acts only as either are in their own nature, or may, by extrinsic evidence, be shewn to be within the scope of the authority given by him, and which may, therefore, be considered as his acts performed by the hand, or his *declarations uttered by the tongue of his appointed substitute), it would be contrary to those general rules and principles to allow a prosecutor, and, through him, the prosecution that he has instituted, to be disgraced by the act supposed in your Lordships' question, without some further proof affecting him than the terms of that question suggest. It is perfectly consistent with the matters of fact contained in your Lordships' question, that the prosecutor may, up to the very moment when the proof is offered, be wholly ignorant of the wicked act of his agent ; it is no less consistent, that, having been informed of the act, he may have rejected it with indignation, and have repudiated the proffered testimony, and withholden the witness from the Court ; and, if he be absent from the trial, which frequently happens, it may be impossible to prove his ignorance in the one case, or the propriety of his conduct on the other.

With regard to the witnesses, my Lords, which is the most important part of this consideration (because, if false witnesses are produced against a person, it is of little consequence to him by what particular procurement they may have been produced), it is to be considered, whether a legitimate inference and conclusion can be drawn against their credit and veracity from the proof proposed. The proposed proof does not directly affect them ; it regards an act, to which, according to the hypothesis, they may be entire strangers ; and, being an unlawful act, they are not to be presumed to have been parties to it, or to any other act of the like nature, without proof against them ; they may be persons of honour and probity deposing to facts really and truly occurring within their own personal knowledge, and taking place within their own sight or hearing as they have averred upon their oath. It may have been intended, that the person, to whom the bribe was offered, should speak to other facts occurring at another time *and in another place wholly unconnected with

[*308]

THE
QUEEN'S
CASE.

them or with the matters to which they have deposed: can it then be reasonably concluded, that the facts deposed by them are untrue; that, however respectable or numerous they may be, they must be all wicked and perjured men, because some other man has, from overweening zeal or a corrupt heart, wickedly endeavoured to seduce by money another person to give evidence touching the matter of that indictment, on which they have appeared? I must say, my Lords, that I am of opinion that such conclusion cannot reasonably be drawn, either in the case proposed in your Lordships' question, or in that analogous case which I have taken the liberty to adduce. The utmost effect, in my opinion, of the proposed proof (and, in many cases, even this would not be a fair or reasonable effect,) would be to excite suspicion; but suspicion is not a legitimate ground for the verdict of a jury, which ought only to be founded upon reasonable and probable proof. For these reasons, I think your Lordships' first question must be answered in the negative.

This, my Lords, is the opinion, which after much consideration I have formed upon the question proposed by the House. That question is couched in the most general and abstract terms, and your Lordships must be aware of the difficulty that may often occur, in forming an opinion upon a question of such a nature, applied not to a matter of abstract science, but to a matter connected with the business and affairs of men. Few cases occur in the practical administration of justice, wherein a Judge does not find some help toward a right decision of a questionable point in antecedent or accompanying facts and circumstances appearing before him, and is not guided in his application of general principles to the individual case by the particulars of that case itself. The question, as proposed by your *Lordships, does not contain any such aid or guide; I mention this, not my Lords by way of complaint against the question, but by way of excuse for the imperfection of my answer to it; and, I must beg leave to add, that notwithstanding the opinion I have delivered on the question proposed, I am by no means prepared to say, that, in no case and under no circumstances appearing at a trial, it might not be fit and proper for a Judge to allow proof of this nature to be submitted to the consideration of a jury: and the

[*309]

THE
QUEEN'S
CASE.

inclination of every Judge is to admit rather than to exclude the offered proof.

Secondly. The same reasons which have induced me to answer your Lordships' first question in the negative, lead me to answer the second question also in the negative. The question is in these words : [the LORD CHIEF JUSTICE here read the second question.]

In answer to this question, my Lords, I must also take leave to add, as another ground of objection to the proof proposed in the question, that it does not thereby appear what was the nature of the papers alluded to, or what the motive of the party endeavouring to obtain them : for any thing that can be inferred from that question, the papers might be unconnected with the subject of the prosecution, and relate wholly to some other and different matter.

Then ABBOTT, Ch. J. delivered the unanimous opinion of the learned Judges to the first part of the third question in the affirmative, and to the latter part of the same in the affirmative also, with a qualification, and gave their reasons as follow :

[*310]

My Lords, we understand the first part of this third question to relate to a prosecution for some crime, the proof whereof is supposed to consist wholly or in part of evidence of a conspiracy entered into by the party then indicted, and under trial ; so that the conspiracy is *to be given in evidence against him ; and the latter part of the question regards the case of a person indicted for some crime, and seeking to defend himself against that indictment, by proving a conspiracy to suborn witnesses against him ; and the points of inquiry in both parts regard only the order and course of adducing the proof before the Court ; and, so understanding this question, we have no hesitation as to answering the first part of it in the affirmative. We are of opinion, that on a prosecution for a crime to be proved by conspiracy, general evidence of an existing conspiracy may in the first instance be received, as a preliminary step to that more particular evidence, by which it is to be shewn that the individual defendants were guilty participators in such conspiracy. This is often necessary

to render the particular evidence intelligible, and to shew the true meaning and character of the acts of the individual defendants; and, on that account, we presume it is permitted. But, it is to be observed, that, in such cases, the general nature of the whole evidence intended to be adduced is previously opened to the Court, whereby the Judge is enabled to form an opinion as to the probability of affecting the individual defendants by particular proof applicable to them, and connecting them with the general evidence of the alleged conspiracy; and if, upon such opening, it should appear manifest, that no particular proof sufficient to affect the defendants is intended to be adduced, it would become the duty of the Judge to stop the case *in limine*, and not to allow the general evidence to be received, which, even if attended with no other bad effect, such as exciting an unreasonable prejudice, would certainly be a useless waste of time.

As to the second part of the question, my Lords, we understand it to be here assumed, that the supposed conspiracy to suborn witnesses against the accused is a *legitimate ground of defence, and that your Lordships do not ask the opinion of the Judges upon that point; and, therefore, upon that point, we do not presume to offer any thing to your Lordships; and, considering this latter part of the proposed question, like the first part, to regard only the order and course of adducing the proof, we should give the same answer in the affirmative, with this qualification only, namely, that the proposed evidence should, in some way, be previously opened to the Court, as in the case of a prosecution to be proved by conspiracy, in order to enable the Judge to form an opinion as to the probability of bringing the evidence home so as to affect some person whose acts are material and relevant to the issue in the indictment then under trial.

[*311]

1. When a witness in support of a prosecution has been examined in chief, and has not been asked in cross-examination as to any declarations made by him, or acts done by him, to procure persons corruptly to give evidence in support of the prosecution, it is not competent to the party accused to examine witnesses in his defence to prove such declarations or acts, without first calling back such witness examined in chief to be examined or cross-examined as to the fact, whether he ever made such declarations or did such acts.

THE
QUEEN'S
CASE.

2. If a witness is called on the part of a plaintiff or prosecutor, and gives evidence against the defendant or accused; and if, after the cross-examination of such witness, the defendant's or accused's counsel discover that the witness so examined has corrupted, or endeavoured to corrupt, another person to give false testimony in such cause, the counsel for the defendant or accused are not permitted to give evidence of such corrupt act of such witness, without calling back such witness.

Oct. 19.

The following questions were proposed to the learned Judges :

First. Whether, according to the practice and usage of the Courts below, and according to law, when a witness in support of a prosecution has been examined in chief, and has not been asked in cross-examination as to any declarations made by him, or acts done by him, to procure persons corruptly to give evidence in support of the prosecution; it would be competent to the party accused, to examine witnesses in his defence, to prove *such declarations or acts, without first calling back such witness examined in chief to be examined or cross-examined as to the fact whether he ever made such declarations or did such acts?

[*312]

Second. Whether, if, on any trial in any court below, a witness is called on the part of the plaintiff or prosecutor, and gives evidence against the defendant in such cause; and if, after the cross-examination of such witness by the defendant's counsel, they discover, that the witness so examined has corrupted or endeavoured to corrupt another person to give false testimony on such cause, the counsel for such defendant may not be permitted to give evidence of such corrupt act of such witness, without calling back such witness?

The question being delivered to Abbott, Ch. J., and the learned Judges having requested leave to withdraw to consider the same, leave was accordingly given till the next morning, when

Oct. 20.

The LORD CHIEF JUSTICE of the King's Bench delivered the unanimous opinion and answer of the learned Judges to both the questions propounded to them, severally, in the negative, and gave their reasons.

ABBOTT, Ch. J. :

My Lords, the learned Judges have considered the questions proposed to them by your Lordships. [Here the LORD CHIEF

JUSTICE repeated the questions.] My Lords, the only material distinction between the two questions appears to be this: viz. that, in the latter of the two, the supposed misconduct of the witness is assumed to have been discovered after his cross-examination. In the Courts below, wherein causes usually begin and end at one sitting, subsequent discoveries rarely occur in the progress of a trial, the parties on each side are expected to come at the commencement duly prepared with all the proof that may be relevant to the matter in issue, and with nothing more; and we think *the only effect of a subsequent discovery, would be to allow the witness to be called back for further cross-examination, if still within reach, which may be done upon that or other reasonable ground. And we are of opinion, that, according to the usage and practice of the Courts below, and according to law as administered in those Courts, the proposed proof cannot be adduced without a previous cross-examination of the witness as to the matter thereof.

THE
QUEEN'S
CASE.

[*313]

The legitimate object of the proposed proof is to discredit the witness. Now the usual practice of the Courts below, and a practice, to which we are not aware of any exception, is this; if it be intended to bring the credit of a witness into question by proof of any thing that he may have said or declared, touching the cause, the witness is first asked, upon cross-examination, whether or no he has said or declared, that which is intended to be proved. If the witness admits the words or declarations imputed to him, the proof on the other side becomes unnecessary; and the witness has an opportunity of giving such reason, explanation, or exculpation of his conduct, if any there may be, as the particular circumstances of the transaction may happen to furnish; and thus the whole matter is brought before the Court at once, which, in our opinion, is the most convenient course. If the witness denies the words or declaration imputed to him, the adverse party has an opportunity, afterwards, of contending, that the matter of the speech or declaration is such, that he is not to be bound by the answer of the witness, but may contradict and falsify it; and, if it be found to be such, his proof in contradiction will be received at the proper season. If the witness declines to give any answer to the question proposed to him, by

THE
QUEEN'S
CASE.

[*314]

reason of the tendency thereof to criminate himself, and the Court is of opinion that he *cannot be compelled to answer, the adverse party has, in this instance, also, his subsequent opportunity of tendering his proof of the matter, which is received, if by law it ought to be received. But the possibility, that the witness may decline to answer the question, affords no sufficient reason for not giving him the opportunity of answering, and of offering such explanatory or exculpatory matter as I have before alluded to: and it is, in our opinion, of great importance that this opportunity should be thus afforded, not only for the purpose already mentioned, but, because, if not given in the first instance, it may be wholly lost; for a witness, who has been examined, and has no reason to suppose that his further attendance is requisite, often departs the Court, and may not be found or brought back until the trial be at an end. So that, if evidence of this sort could be adduced on the sudden and by surprise, without any previous intimation to the witness or to the party producing him, great injustice might be done; and, in our opinion, not unfrequently would be done both to the witness and to the party; and this not only in the case of a witness called by a plaintiff or prosecutor, but equally so in the case of a witness called by a defendant; and one of the great objects of the course of proceeding established in our Courts is the prevention of surprise, as far as practicable, upon any person who may appear therein.

The questions proposed by your Lordships comprise not only declarations made by a witness; but, also, in the language of the first of those questions, "acts done by him to procure persons corruptly to give evidence in support of the prosecution;" and in the language of the latter question, "a discovery that the witness has corrupted or endeavoured to corrupt another person to give false testimony in such cause."

[315]

My Lords, we understand the acts thus mentioned to be acts occurring in the ordinary mode and usual course wherein such transactions are proved in common experience to take place, because we presume, if the questions had related to an act done in an extraordinary and unusual manner, our attention would have been directed to the special mode and circumstances of the act, by the frame and language of the questions. Now, such acts

of corruption are ordinarily accomplished by words and speeches : an offer of money or other benefit derives its entire character from the purpose for which it is made, and this purpose is notified and explained by words ; so that an enquiry into the act of corruption will usually be, both in form and effect, an enquiry as to the words spoken by the supposed corruptor, and words spoken for such a purpose do, in our opinion, fall within the same rule and principle, with regard to the course of proceeding in our courts, as words spoken for any other purpose ; and we do not, therefore, perceive any solid distinction with regard to this point between the declarations and the acts mentioned in the questions proposed to us. It will be obvious, that the observations regarding convenience and inconvenience, which we have taken the liberty to offer to your Lordships as to the proof of words, are alike applicable to the proof of acts. Nice and subtle distinctions are avoided in our Courts as much as possible, especially in matters of practice, on account of the delay, confusion, and uncertainty, to which such distinctions naturally lead. For these reasons, my Lords, we have thought ourselves called upon to answer both questions wholly in the negative.

THE
QUEEN'S
•CASE.

C. P. EASTER TERM.

IN RE PEARSON.

(4 Moore, 366.)

1820,
April 29.

[366]

The Court will grant a *habeas corpus* in the first instance, to bring up an infant, who had absconded from his father, and was detained by a third person without his consent.

BLOSSET, Serjt. moved, that Pearson the younger, might be brought up on a *habeas corpus*, on an affidavit which stated, that he had absconded from his father, without his knowledge or consent, to the house of a person by the name of Richardson, who was then resident in Yorkshire; that the father went to enquire for him there, when Richardson said, that he was gone, and not then an inmate in his house; that a constable afterwards wrote the father, that his son was still there; that the former again went there, when Richardson confined his son, and said that he was his (Richardson's) apprentice; that the son was only thirteen years of age, and that his father, although assisted by the constable, could not take him out of Richardson's house, he having locked him up for the purpose of preventing them from so doing.

On the Court's enquiring, whether this was not in the nature of an application for a rule *nisi*, that the writ might issue? the learned Serjeant referred to *Wood's* case,[†] to shew that this Court has a general jurisdiction to grant writs of *habeas corpus*, in all cases whatsoever, in the first instance. He also cited the case of *The King v. Penelope Smith*,[‡] on which the application was

Granted.§

[†] 3 Wils. 172.

[‡] 2 Stra. 982.

§ In the case of *The King v. Delaval*,|| Lord MANSFIELD said, that "In cases of writs of *habeas corpus*, directed to private persons, 'to bring up infants,' the Court is bound, *ex debito justitiæ*, to set the infant free

from an improper restraint, but they are not bound to deliver them over to any body, nor to give them any privilege; that this must be left to their discretion, according to the circumstances that shall appear before them."

|| 3 Burr. 1436.

EXCH. MICHAELMAS TERM.

EVANS AND OTHERS v. MASSEY, Esq.†

(8 Price, 22—38.)

1819,
Dec. 17.

[22]

A bequest to a child *en ventre sa mere*—introduced by reciting that the testator, “having two natural children, and the mother supposed to be now carrying a third child”—is a good bequest, although in the immediately subsequent parts of the will, the testator, referring to the previous bequest to the three children, call them indiscriminately *my* children, and *my* natural children as aforesaid; because it is not a bequest to one not otherwise described than as the unborn illegitimate child of the testator, but the object of it is pointed out with sufficient certainty; for he has not merely called the legatee *his* child, but has much more particularly designated it by the introductory part of the bequest, so as to obviate the necessity for shewing that the offspring of the woman was the child of the testator: or, in the comprehensive language of the judgment, it is not by such a bequest made a condition precedent, that, to enable the child to take, it must be ascertained to be the child of the testator.

The essence of the rule is, that in all such cases there should be sufficient certainty in describing the object of the testator's bounty, to preclude the necessity of having recourse to proof *aliunde*.

THE questions in this case arose out of the following facts stated on the record by the bill and answer, and found by the Deputy Remembrancer's report, the result of a reference to him to take an account, and enquire of the necessary matters to form the foundation of further directions.

Bills had been filed by the two nephews, the residuary legatees of Henry Evans, and two of his illegitimate children, against his executor, for the purpose of obtaining a declaration by the Court, whether the child mentioned to be unborn at the time of the making of his will by the testator, was or was not entitled to take any benefit under it.

The testator, who resided in India, had, at the time of his making his will, two natural children by a woman with whom he was then cohabiting, and who was then pregnant with another child. *The will was dated the 14th of August, 1810, the material part of which, as far as relates to the points now brought under discussion, was in these words, “Having two natural children, and the mother supposed to be now carrying a

[*23]

† *In re Hastie's Trusts* (1887) 35 Ch. D. 728, 56 L. J. Ch. 792.

EVANS
v.
MASSEY]

[*24]

third child, I do will and bequeath [the whole of my property in England at this time, or now on the seas proceeding to England, to be divided equally between them, that is to say, if another child should be born by the mother of the other two, in the proper time, that such child is to have one-third of such property in England, or proceeding to England, this property to be laid out in the funds, or other public securities, and allowed to accumulate till the children shall respectively attain the age of twenty-one years, deducting annually from the interest such proportion as may be necessary for their education and their other expenses : should either of the children die, the property to be divided between the other two, and in that case the survivor to be the heir of the other two, provided one shall live to be of the age of twenty-one years.] If they all die previously to their reaching that age, then my property to go to my two nephews, Richard Evans and Lacy Evans, as hereinafter mentioned. It is to be understood, that each child attaining the age of twenty-one years, is entitled to his or her third or half share, as the case may be. I request my dear friend J. H. D. Ogilvie, of Madras, and John Binney, Esq. agent at Madras, to be my executors in India, and my friend Colonel Massey to be my executor in England, *and guardian to *my* children jointly, with Richard Evans and Lacy Evans, my two nephews. I bequeath the whole of my remaining property, after paying *my* natural children as aforesaid, to (the said nephews, describing them) with the deductions hereafter mentioned, and also leave them my residuary legatees. The deductions will be mentioned hereinafter in a codicil."

The testator died on the 16th of the same month. The mother of the children was *enseint* at the time of the date of the will, and in about seven months after the testator's decease was delivered of a female child, which died shortly after its birth.

The cause was first heard in December, 1814, when, on a reference to the Deputy Remembrancer being ordered, the report found in substance the facts above stated, and upon that report it was now again brought on for further directions.

[In the course of the argument were cited *Earle v. Wilson*, 11 R. R. 130 (17 Ves. 528); *Gordon v. Gordon*, 15 R. R. 88

(1 Merivale, 141), and *Wilkinson v. Adam*, 12 R. R. 255 (1 V. & B. 422, 446).]

EVANS
v.
MASSEY.

RICHARDS, C.B. (after time taken for consideration) now delivered judgment :

Dec. 17¹

[32]

The question in this case is, whether the two illegitimate children of the testator by the female to whom he has alluded in his will, are entitled to the interest which they claim in the bequest to the posthumous child of which she was pregnant at the time of making the will. [Here his Lordship read the words of the bequest.]

In point of fact that person was then with child, and that appears by her having been afterwards delivered in due course of time. The questions which have arisen in this case have been already much considered in two recent cases, *Earle v. Wilson*, and *Gordon v. Gordon*, one before the then Master of the Rolls, and the other before the Lord Chancellor, each of which have been much relied upon, on either side, in the course of the present argument. There was also another case of *Wilkinson v. Adam*† cited; but that was rather adverted to for the purpose of introducing this proposition, which has been admitted, that as the Courts will not, on grounds of public policy, and for preserving the interests of morality, permit *proof to be given of an illegitimate child being the child of a particular individual as the father, the difficulty arising from the consequent uncertainty of the object of a bequest of property to the unborn child of such individual, described only as *his* child, has in law the effect of rendering such a bequest wholly ineffectual for want of a sufficiently precise description of the person intended to take the interest, there being no admissible means of supplying the deficiency *aliunde* so as to make it effectual. If, however, a legacy be given to an unborn natural child of a woman, and the description be so certain as distinctly to point out the object of it, there can be no doubt that such a bequest would be valid, and may take effect. The dictum of Lord COKE and the decision of

[*33]

† The decision in *Wilkinson v. Adam* was subsequently (in 1823) affirmed in the House of Lords, 12 Price, 470; and see 14 R. R. Pref. x. —R. C.

EVANS
v.
MASSEY

LORD MACCLESFIELD, proceed upon the ground I have adverted to, of uncertainty in the person of the intended legatee, in the case of a bequest to an unborn natural child, described solely as the child of the testator. It is therefore now become an established rule of construction in such cases, that the person of a legatee must be certainly described, or be capable of being clearly ascertained.

[*34]

This case has been very well argued here on its own circumstances. I will shortly review the authorities which were mentioned on both sides. The case of *Earle v. Wilson* was the first cited on the part of the plaintiffs [his Lordship went very minutely into the particulars of that case]. If the bequest there, had been worded in such a manner *as to have obviated all uncertainty, it would undoubtedly have been held good. It is quite clear that Sir WILLIAM GRANT founded his decision in that case upon the ground of the uncertainty in the description, wholly, and not as Lord MACCLESFIELD is said to have done, on any principle or policy of the law, tending, or having for object merely, to discourage the immorality of illicit intercourse.

It was contended that it is clearly manifest from the tenor of this will, that the testator contemplated, as the object of the bequest, his own child ; and that it more plainly appears in this case that he did than it does in the case of *Earle v. Wilson*. Now, I confess, that if this bequest had been in precisely the same words as the bequest there, I should have had infinite reluctance in departing from the construction put upon it by the MASTER OF THE ROLLS. At the same time I must say (meaning no disrespect to the very learned Judge who decided that case) that I do not understand the grounds upon which it proceeds, and therefore cannot entirely accede to it. I well remember that the decision excited surprise at the time ; and I know that some of the Judges have intimated upon several occasions dissatisfaction with it. I should therefore be very sorry if I could not distinguish this case by the different circumstances under which it is brought before me, so as, without combating that authority, to decree in favour of the bequest to this child.

[*35]

What Sir WILLIAM GRANT threw out incidentally, *in the course of his judgment, in the case of *Earle v. Wilson*, the LORD CHAN-

EVANS
v.
MASSEY.

CELLOR afterwards acted upon, as being sound law, in the subsequent case of *Gordon v. Gordon*. In that last case the LORD CHANCELLOR held, that a legacy given to an unborn illegitimate child was good; and so far he agrees with the MASTER OF THE ROLLS. [His Lordship here read the words of the codicil in the case of *Gordon v. Gordon*, and the Chancellor's judgment (1 Merivale, pp. 150, 151, 152.)] So that the LORD CHANCELLOR takes the MASTER OF THE ROLLS to have admitted, that a legacy might be effectually given to a child with which an unmarried woman was pregnant, unless it were made a condition precedent to the gift, that the child should actually be the child of a particular individual, as the father. That is the express ground of distinction, in substance, which the CHANCELLOR takes between the case of *Earle v. Wilson*, and the one then before him; and he says, that in order to shew that objection to exist, "you must establish that it could not be the testator's intention that the child in question should take at all, unless it were his child;" and his Lordship held, that in that case such a construction was not necessary. On the 6th of February following the CHANCELLOR pronounced final judgment, adhering to his former opinion, and declaring that it was consistent with the doctrine of Lord COKE, that an illegitimate child *en ventre sa mere* might take a legacy bequeathed to it if described with sufficient certainty. His Lordship says, "I studiously abstain from expressing any *opinion as to what it would be if the words were 'to my child,' while I decide, that the words being only 'the child with which A. B. is now pregnant,' those words will do so as to give effect to the intention in its favour."

[*36]

We have therefore only to enquire, in this case, whether there be, in the terms of the present bequest, worded as it is, such a condition precedent annexed to it by the testator as by necessary construction requires that in order to give effect to the bequest, the child must be shewn to be the testator's child, and that he meant to give it only in case the child should be his; and that not only by matter of implication or argument, but of clear illustration. The testator's words are, "having two natural children, and the mother supposed to be now carrying a third child." Now he does not say with which she is pregnant *by me*,

EVANS
v.
MASSEY.

but merely that she is supposed to be pregnant generally, and the time of her delivery would prove that fact—then he bequeaths to such child the legacy in question. It is quite clear that there is nothing in the words of that bequest, so far, asserting that the child was his, or that he thought so; for, although there can be no doubt that he did think so, yet he does not in terms make such supposition the obvious and sole motive of the bequest. The words are quite general, merely particularizing the child which she was then supposed to be carrying, and that would certainly have excluded an after-begotten child, if his then

[*37] *supposition should turn out to have been incorrect. [His Lordship read the whole of the bequest as set out in this case.] Now the only difficulty in these words in which the bequest is expressed, arises from the testator having afterwards, in alluding to the children, called them *his*: and upon that it has been contended, that this case is within the reasoning and the principle of the decision in *Earle v. Wilson*; because the testator, it is said, plainly means to assert that the children are his, and that the legacy is given to the unborn child, as one of his children; and that it is given to it entirely on that consideration, as the basis and condition precedent of the gift. I do not, however, think that those subsequent words can be considered as so applying to the bequest itself as to modify and control it; they are merely a reference to it, and were not intended to have any effect upon it. The allusion does not shew that he meant the child to take only in case of its being his, nor does it amount to an assertion that the child was his, or that the testator considered that he was giving to it the legacy solely as his child. I think, therefore, that this bequest falls within the principle adopted by the MASTER OF THE ROLLS, and recognized and acted upon by the LORD CHANCELLOR; and that as it has been described with sufficient certainty what child it was whom the testator meant as the object of the bequest, it took an equal share with each of the other two natural children of the testator. I hardly need say that I do not consider the event of the child dying so soon after

[*38] its birth, as *making any sort of difference in this case. I feel quite satisfied with being able to decide in this manner, without opposing my opinion to any of the authorities.

DECREE.

EVANS
v.
MASSEY.

Declare that the infant plaintiffs, Ann Evans and Henry Evans, are entitled to have the whole of the Bank 3 per cent. annuities standing, &c. accumulated for their benefit during their respective lives, or until they or one of them shall attain the age of twenty-one years—with liberty to the parties interested to apply to the Court in case of the said infants dying under that age. Costs of all parties to be paid out of the surplus of the cash in Court.

THE ATTORNEY-GENERAL v. LORD EARDLEY
AND OTHERS.

(8 Price, 39—82; S. C. Daniell, 271.)

1819.
June 23, 28.
1820.
Jan. 17.

[39]

The tithes of all extra-parochial lands belong *jure coronæ* to the King; and the title of the Crown is not confined to such extra-parochial lands only, as were forest or parts of forest land.

Where in a grant (*ex mero motu*, &c.) by the Crown, of extra-parochial lands, the words "tithes, oblations, and obventions," were found to have been introduced amongst the general words, they were held not to pass the tithes of such lands, in a case where it was in evidence that the tithes were in lease at the time of the grant, and that the Crown had continued to demise them whenever they had reverted; the Court determining that the continued exercise of such strong acts of ownership, was sufficient to countervail the slight effect of such words, even if where so introduced they were of any force at all, and were not rather attributable to mistake.

Returns of any particular subject-matter by the auditors in their accounts of the Crown revenue, are sufficient proof of its having been kept in charge to protect the claim of the Crown from the operation of the Nullum Tempus Act (9 Geo. III. c. 16), although they have returned "Nil," and the claim have not been put in suit thereon for more than sixty years.†

A decoy in the hands of the owner, who remunerates the person employed by him to manage it, by allowing him half the profits, is not liable to tithes. Ordered, therefore, as to him, that he go without day.

THE *Attorney-General* filed this information against the defendant Lord Eardley, as owner and occupier: and against the other defendants as occupiers for an account of the titheable

† Observe that on this point the Act of 9 Geo. III. is altered by 24 & 25 Vict. c. 62.—B. C.

THE
ATT.-GEN.
v.
LORD
EARDLEY.

matters taken by them upon the lands in their occupation within a certain fen, forming part of the Bedford Level called Borough Fen, which, having been drained in the time of Charles II., had ever since yielded titheable matters.

It stated, that the lands were extra-parochial, and paid no tithes to any church; and that the King was therefore entitled to them, in right of his Crown of England.

[*40] Then—suggesting that the defendants pretended title under a former grant of the Crown, and insisted that his Majesty was barred of his *right to the tithes, by the non-enjoyment thereof for sixty years—it charged, that the tithes were not only not included in that grant of the lands by the Crown, but were then and often afterwards actually demised by the Crown to other persons; and that since the expiration of those leases, the tithes had been duly in charge to his Majesty, and had stood insuper of record; and that, therefore, the King's right had been saved from the operation of the statute.

The defendant, Lord Eardley, admitted his ownership of the lands, but denied occupation of any part of them otherwise than by employing a person to manage a decoy, covering about forty acres of the said lands, to whom, in respect of such management, he allowed one half of the clear profits; and he insisted that no tithes were payable in respect thereof.

The other defendants, not admitting the right of the Crown as insisted on, to the tithes of all extra-parochial lands, claimed title under a grant of the lands in question and the tithes thereof; and submitted (if his Majesty ever had any title to the tithes) that by the length of time, during which the Crown had been out of possession, and the operation of the statute (9 Geo. III.), his Majesty had lost his right and was barred of all remedy.

[*41] The short statement of the subject-matter of the suit, as already transcribed in substance from the record of the pleadings, shewing at one *view the points raised in argument, it will only be necessary further to state, that the defendant having set up a title by virtue of a royal grant of these lands (forming part of the Bedford Level); the Crown, in support of its claim, produced, as evidence that the tithes were not intended to pass by the grant and did not pass, various Crown leases of the tithes of the

THE
ATT.-GEN.
v.
LORD
EARDLEY.

lands in question to different successive lessees, as well previous as subsequent to the grant to Lord Torrington, under whom Lord Eardley claimed, and, amongst others, to the Earl of Lincoln, one of the former proprietors of those very lands, who had purchased under Lord Torrington's grant. He however was only tenant for life, having suffered a recovery, under which he had limited to himself a life interest only. The counsel for the Crown also put in a decree of this Court, of an account, in favour of the then complainant, a Crown lessee, in a suit against occupiers for tithes, who had set up a defence of *modus*.

There were also given in evidence, accounts of successive auditors, relating to extra-parochial tithes of the Level, from the year 1729 down to the institution of this suit, in order to shew that those tithes, as part of the casual revenue, had been constantly kept in charge. They had, as it appeared, in all the later, for more than sixty years returned, "Nil."

The *Solicitor-General*, at the hearing, rested the case of the Crown upon the *primâ facie* *title of the King, *jure coronæ* to the tithes of the lands in question, founding it on the proposition, that it was the acknowledged law, as applied to extra-parochial lands, which the fen had been admitted to be, that the Crown was entitled to the tithes of all the lands in the kingdom which were not situate within any parish.

[*42]

Shadwell, *Sugden* and *Sidebottom*, for the defendants, contested the universality of that proposition, now for the first time so broadly laid down, founded, as they submitted, wholly upon dicta attempted to be applied to furnish a principle, for which they urged, that no direct legal authority could be cited. On the contrary, they insisted that all the cases upon that point confined the right of the Crown to tithes of extra-parochial forest lands.

They also contended, that if the Crown had been at any time entitled to the tithes of the lands in question, they had been granted away by the Crown from time to time, and ultimately to Lord Torrington, under whom the defendants claimed by a grant in the 2 W. & M. (14th May, 1669) by which grant of the Crown

THE
ATT.-GEN.
v.
LORD
EARDLEY.
[*43]

the defendants insisted that the tithes had been expressly and *eo nomine* granted together with the lands in question.

And they urged, finally, that if by that grant, the tithes did not pass, the right of the Crown *was now barred by the provisions of the Nullum Tempus Act (9 Geo. III. c. 16).

* * * * *

1819.
June 23, 28.
[49]

The *Solicitor-General*, *Clarke*, *Roupell*, and *Pemberton*, supported the claim of the Crown. * * *

Shadwell replied. * * *

1820.
Jan. 17.
[50]

RICHARDS, C.B. now delivered judgment:

This is an information filed by his Majesty's *Attorney-General* against Lord Eardley and other persons occupying lands as his tenants and the representatives of a deceased occupier. Lord Eardley does not appear to have occupied any part of the land himself; and, I believe, there is no account prayed against him: but it is said, that having received the value of the tithes from his tenants, he therefore ought to pay them over to the Crown. The information is, however, very properly filed directly against the tenants of Lord Eardley, as occupiers, for an account of the titheable matters taken by them from the lands in question.

It is stated, and admitted, that the lands of the tithes from which the plaintiff by the present information seeks a decree for an account, are not situate within any parish—in other words, that they are extra-parochial. And it is therefore contended, that the King, is *jure coronæ*, entitled to the tithes of those lands, on the general principle, that he is entitled to the tithes of all lands which are situate in extra-parochial places.

On the part of the defendants it is urged, first, that (admitting these lands to be extra-parochial) the King is not, in point of law, entitled, universally, to the tithes of all extra-parochial lands.

[51]

They also contend, secondly, that if he be, they have, in this instance, a right to the tithes of the lands in question, by virtue of a title derived from the Crown, by a grant to Lord Torrington, under whom Lord Eardley claims.

And they submit, as a third ground of defence, that if the Court should be of opinion that that claim cannot be supported ; yet the common law right of the Crown is barred in this case by the operation of the statute 9 Geo. III., or, as it is commonly called, the Nullum Tempus Act.

THE
ATT.-GEN.
v.
LORD
EARDLEY.

Now, as to the first ground of defence—that the Crown is not, by virtue of the royal prerogative, entitled to the tithes of extra-parochial lands generally—I consider any enquiries respecting that, in the present case, to be rather matter of curiosity than necessary research—matter which may serve, perhaps, to elucidate, but is not at all essential to the decision of this case, as I shall presently shew. Out of respect, however, to the ability with which that point was argued, I have consulted the authorities cited, and am prepared to say, the result is, that I am of opinion, that the King is by law entitled to the tithe of the produce of all lands that are extra-parochial. It follows, therefore, that the King is entitled to the tithes of the lands in question, unless the defendants can establish a specific title founded upon some grant of the Crown, or otherwise.

Tithes, as we all know, are a property of a very special nature. They do not belong to the owner of the land or of the animals in respect of which they arise ; nor, at the time of their origin, were they appropriated to any particular persons, so as to give them a right to demand them ; for, as far as we have any traces of their history, it appears to have been left to the election of the owner of the other nine parts of the titheable matters, to dispose of the tenth in distribution amongst the clergy, and sometimes amongst the clergy and objects of charity. The first institution of the payment of tithes in this country, as rendered in latter days, nowhere clearly appears ; and, I apprehend, it has not hitherto been ascertained, at least to the satisfaction of any of the learned persons who have made it the object of their research. Tithes, indeed, were probably introduced into this country as early as Christianity itself, but as to the circumstances, in what manner, and under what regulations, we have so far no authentic records. It is said, and perhaps correctly, that in the earlier ages, the owners of property yielding titheable articles could not use the whole for their own benefit, but were obliged to render

[52]

THE
ATT.-GEN.
v.
LORD
EARDLEY.

[*53]

the tenth part to some of the officiating clergy as their preference should direct them, or, as others say, to the Bishop, to be applied by him for the use of the clergy, or to be administered in charity. In progress of time (but when does not clearly appear) a decree was made for the appropriation of the tithes, whereby it was ordained, and thereupon it became part of the *common law, that the tithes should be paid in the different parishes wherein they accrued, to the parson of the particular parish. When parishes were first established in this kingdom is not with any degree of certainty known, but after they were established, whether it were by common law or by statute, for writers differ upon that, the clear result of all the enquiries seems to be, that the tithes were appropriated to the parsons of the several parishes in which the titheable matters were produced, and their right to demand and enforce the render of them became part of the general law of the land.

According to the doctrine prevailing under the feudal system, the title to all the land of the kingdom being supposed to have proceeded originally from the Crown, if any parcel of it had never been granted out by the Crown, it was considered, and by law it is assumed, to be still in the Crown. It does not appear, from any thing we are able to find in the result of the researches of learned men upon this subject, that in ancient time the Crown had a greater interest in tithes than any other owner of land, except that the King, as being *mixta persona*, might hold tithes for his own benefit, as ecclesiastical persons may, which the subject could not do.

[*54]

It may be necessary to observe here, with respect to forests, that some of them were of a date to which we cannot assign any time; some forests, or parts of forests, were in parishes, and *other forests were not. Some parts of those tracts called forests did not belong to the Crown. It was admitted by the counsel for the defendants to be quite clear, that the tithes of forests, if they were extra-parochial, have, for that reason, always been held to belong to the Crown. But there is, perhaps, some difficulty in furnishing the reason why the tithes of forests which are extra-parochial, should belong to the Crown, when tithes arising from forests, which are in parishes, belong to the

parson of the parish ; and that is part of the distinction which is taken on behalf of the defendants here. For that purpose we must look into the cases, such as they are, to be found in the books. I am not ashamed to own, that when this line of argument was first struck out by Mr. *Shadwell*, it appeared to me to be of a novel character, and I am very much countenanced in having so little acquaintance with this subject, by finding that every lawyer to whom I have applied for information on the subject since the argument of this case, has not been able to give me much assistance. I must confess, when one looks into the books, there are more difficulties than I could have supposed had existed : but I think, that from the result of all the cases which are important upon this subject, we shall be very fairly entitled to draw that conclusion which has usually prevailed,—that where lands are extra-parochial the tithes arising therefrom belong *primâ facie* to the Crown.

THE
ATT.-GEN.
v.
LORD
EARDLEY.

In 1 Rolle's Abr. p. 657, letter O, pl. 4, it is said : " The King shall have the tithes in places *which are without any parish, come en forests, et hujusmodi, and may grant them by letters patent, and the patentee shall have them." Now, assuredly, however we consider it, this is a very general proposition. It is, in substance, the King shall have the tithes in places which are extra-parochial ; as, for instance, in forests *et hujusmodi*. Now, what I observe, with respect to forests, as applying to the expression of the word, as found in this place is, that it is used as one instance of an extra-parochial place : if so, then the words "*et hujusmodi*" must apply, I think, to something that is not forest, but is, however, of the nature of forest, so far as that it is not within a parish ; for the proposition is predicated of a forest as a place not within a parish. The King being admitted to be entitled to tithes of forests "without any parish," the word *hujusmodi* must be taken to apply to every thing of the same sort, in respect of its not being within a parish ; it cannot be applied to forest as forest, therefore I consider it to be used to include every tract of land which is extra-parochial ; for that is, as I conceive, the true meaning of the word *hujusmodi*.

[*55]

Then, in the next passage, we find it stated, that in the case of the *Prior and Bishop of Carlisle* it is said, "that tithes of land

THE
ATT.-GEN.
v.
LORD
EARDLEY.

[*56]

within a forest which is without any parish belong to the King;" and it assigns as a reason, "pur ceo que il in foresta prædicta villas ædificare, ecclesias construere, terras assartare, et ecclesias illas, cum decimis terrarum illarum, pro voluntate sua cuicunque *voluerit conferre potest, eò quòd foresta illa non est infra limites alicujus parochiæ." Now that passage certainly does seem to qualify the preceding passage, which appears to be very general, and an almost universal proposition. There, it was said, the King shall have the tithes in places without any parish, as in forests, *et hujusmodi*; but here the reason given is, "because he may build towns, erect churches, assart lands, and give the tithes of those lands to anybody, according to his pleasure,"—which by the common law no other person could do.

In Brooke's Abr. tit. Dismes, pl. 10, it is said, *nota*, that the King has tithes of places in great forests, such as Inglewood, Rockingham, and Sherwood, *et hujusmodi*, which are without any parish, and the Bishop shall not have them. Now, this is equivocal, and seems rather to incline against the proposition stated in Rolle, for here it is said, that Kings have tithes of places in great forests, such as Inglewood, Rockingham, and Sherwood, *et hujusmodi*; and in this case I should consider *hujusmodi* to mean only such great forests as are so specifically named.

[*57]

Then, in Style, 137, we have the case of *Banister v. Wright*, which was in 24 Ch. I. It was there said by the Court, that "tithes which lie not within any parish are due to the King,"—this is very general;—"and that lands must be parcel of a parish either by prescription or by Act of Parliament; and that lands lying within a forest *and in the hands of the King do not pay tithes, although they be within a parish,"—that is, because the King is capable of holding the tithes; "but if the lands be disafforested and be within a parish they ought to pay tithes; for their not paying tithes, being in the King's hands, is but an immunity for that time only." So that here it is held, that tithes not lying within any parish are due to the King—that is certainly very general; then the case goes on to say, not qualifying or restraining the generality of the first passage, that the lands must be parcel of a parish, either by prescription or by

Act of Parliament; and that lands lying within a forest do not pay tithes, for they are in the hands of the King; but if the lands be disafforested, if they be within a parish, they ought to pay tithes. Now, that must mean, of course, to the parson of the parish; for the King's right was only for the time whilst they were in his hands. So that although it does not say they shall not be paid to the King, I think it must be understood, after the first general proposition, that "tithes which lie not in any parish are due to the King," that the tithes which are not within any parish necessarily belong to the King; but that if disafforested within a parish, they go in that case to the parson.

In the 2nd Institute, p. 647, there is this passage: speaking of an opinion of Sir W. Herle, it is said, "He grounded his opinion in this case upon the canon law, which is, that the Bishop is to have all tithes growing in lands not assigned to any parish *within his diocese"—that is very general. "Yet," he proceeds, "this canon being against the law of the land, never had allowance within this realm; for in such parts of *forests* as are out of any parishes the King shall have them." Here he certainly specifies of forests particularly; but the first part of the passage is, that the Bishop is to have all tithes growing in lands not assigned to any parish. Now, I should have conceived, that when Lord Coke gave this first part of the proposition so generally, that the Bishop is to have all tithes not assigned to any parish within his diocese, he would have gone further and said, that by our law also all other tithes belonged to the Bishop, unless he meant the second part to cover the whole, and to be co-extensive with the first. Lord Coke then cites the case of the *Bishop and Prior of Carlisle*. Then he adds, and Edward the First granted tithes coming of land within the Forest of Deane, as were not within any parish, to the Bishop of Landaff and his successors. Now there have been two cases in this Court upon that grant—one of them in the time probably of many of us, certainly in my time, I mean the case of the *Bishop of Landaff*—in which, although there was no decision upon the point, it was understood to be as much matter of course, passing currently, that the tithes of extra-parochial places belonged to the King as that the fee-simple of a freehold estate of inheritance descends to the heir.

THE
ATT.-GEN.
v.
LORD
EARDLEY.

[*58]

THE
ATT.-GEN.
v.
LORD
EARDLEY.
[59]

Lord Coke, also, in the 2nd Institute, p. 651, in commenting upon the statute of Edward the Sixth respecting tithes, says, "Where the King ought to have the tithes within the wastes or common in his forests which are not within any parish, this branch giveth the tithes of the increase of cattle to the parson of the parish where the owner dwelleth." That is, the tithes of the cattle agisted, wherever that might be, not within the parish. Here the word "forest" is again used, but I think that the same construction should be put upon it here, which I have endeavoured to shew ought to be put upon it in the passage which I quoted previously from Rolle.

In Cro. Eliz. pp. 511, 512, we find a very material case.† Sir Edward Coke, at that time, it is true, was only counsel; but we know that the author of these reports, as does Lord Coke himself in his own reports, states the arguments, if they are not contradicted, as having been considered to be founded upon the law of the land, and therefore sanctioned by the Court. We find there, that Sir Edward Coke is stated to have used this argument for the prescription being good, that, "before the Council of Lateran, tithes were not payable here to certain persons, nor to places, as appears, 11 Ass. pl. 9, 44 Ed. III. 5, 16 Hen. VII. 18, which is the reason also, why the King shall have the tithes of lands out of any parish, because the Council extended not unto them, and laymen *at the common law were not capable of any tithes." The effect of this, therefore, is, that such was Lord Coke's statement of the law in argument to the Court, and it was not contradicted by them, nor by any authority that I have seen, namely, that before the Council of Lateran tithes were not payable to certain persons, nor to places. Whether it be correct or not, that is, whether it be corroborated by the researches of antiquarians or not, I do not know, and it is a point of no great consequence. Be that fact as it may, that is the reason given why the King shall have the tithes of lands which are extra-parochial.

There is a text book which I shall now refer to, as I have always understood it to be a book of some value as an authority. I mean Sir Simon Degge's. In p. 227, he says this, "As for extra-parochial tithes there have been some differing opinions.

† *Wright v. Wright.*

[*60]

Sir William Herle was of opinion that they belonged to the Bishop of the diocese, as general parson of his whole diocese, grounding his opinion, as it should seem, on the canon law, but there was never any such canon law received or approved in this kingdom." He here refers to cases in the Year Books, the same as were referred to by the counsel for the defendant, but which seem to throw no great degree of light upon the subject. Mr. Selden, he says, considers that tithes in parishes may be disposed of arbitrarily; these are the two opinions. "But," he observes, "it hath been resolved, both in Parliament and by several judgments at common law, that all extra-parochial *tithes belong to the King, who is a mixed person, and capable of tithes at the common law in pernaney,"—that is the conclusion which Sir Simon Degge drew beyond all doubt.

THE
ATT.-GEN.
v.
LORD
EARDLEY.

[*61]

I shall next refer to Comyns's Digest, tit. Dismes, 3. Comyns, as was stated very accurately at the Bar, quotes the authority of Rolle's Abridgment and Style which I have already mentioned. He says, that "extra-parochial tithes belong to the King generally." Now there can be no question that the authority of Lord Chief Baron Comyns is very considerable, and although he quotes those two books which I have mentioned (as had been already suggested at the Bar), yet it is evident, that the conclusion which he drew from them, and the construction which he put upon the cases, is exactly the construction which I have adopted, although he does not state his reasons, which would no doubt have been much better than those which I have given here; but it is quite clear that he deduced the same doctrine from the decisions in those cases, which I consider them as establishing.

In Bacon's Abridgment, tit. Tithe, G. 67, it is said, "All tithes arising in an extra-parochial place, are, by the canon law, to be paid to the Bishop of the diocese in which the place lies;" (in former times there were no parishes, and the whole diocese was considered one parish,) but that was not the common law of England. "But by the common law," he says, "all such tithes are to be paid to the *King. As the appropriation of tithes, in consequence of the Decretal Epistle of Pope Innocent III. extended only to parochial tithes, all the tithes of extra-parochial places continued to be due to the King. And, consequently, all

[*62]

THE
ATT.-GEN.
v.
LORD
EARDLEY.

extra-parochial tithes of which no grant has been made, are at this day due to the King." And this no doubt proceeded upon the principle, that where there is no particular grantee (for that is the original supposition) in order to extinguish the condition of occupancy, as much mischief must always arise from such a mode of claiming property, it was considered as remaining in the King, from whom, it is presumed all property in land originally proceeded in some way or other which cannot now be satisfactorily shewn.

I shall now conclude my references with what Mr. Justice BLACKSTONE says, in the first volume of his Commentaries, p. 113: "Thus parishes were gradually formed, and parish churches endowed with the tithes that arose within the circuit assigned. But some lands, either because they were in the hands of irreligious and careless owners, or were situate in forests and desert places, or for other now unsearchable reasons, were never united to any parish, and therefore continue to this day extra-parochial; and their tithes are now by immemorial custom payable to the King instead of the Bishop, in trust and confidence that he will distribute them for the general good of the Church: " Throughout the land the tenth part of the produce must be rendered for the *benefit of the parson, excepting in excepted cases, but they must be rendered, and it is presumed to be for the benefit of the Church, even though recovered by the hands of the Crown.

*63]

Upon the whole, therefore, it appears to me clearly from the cases and text books which I have cited (many of them certainly using the word "forests," without stating more), that we must take the word "*hujusmodi*" where used throughout, and upon which I put that extended construction, as intended to mean not merely a forest in the common acceptation of the word, but to include all tracts of land not belonging to any parish, so as not to confine the King's right to that which is, strictly speaking, a forest. That construction too agrees with the conclusion drawn by the Chief Baron COMYNS and Mr. Justice BLACKSTONE. So viewing all the authorities, therefore, and finding it extremely difficult to draw any other conclusion, unless I could find any decisions to oppose it—and I have not been able to find any case or *dictum* contradicting it, either upon the present or upon

THE
ATT.-GEN.
v.
LORD
EARDLEY.

any former occasion when I have found it necessary to refer to cases on this subject—I cannot but consider the general principle to be well established, that the King is entitled to the tithes of all lands situate in extra-parochial places.

But when I say I have found no case or *dictum* leaning the other way, I mean to except a chapter in a book called the “Doctor and Student,” and there, there is certainly to be found the following dialogue. The Doctor says, “It was asked of me but late, *if certain waste ground, whereof was never any profit taken, and that lay within no parish, but in some forest, or that is newly won from the sea, were brought into arable land, whether the Parliament might appoint, who should have the tithe thereof, and he that asked me the question, thought it might. I pray thee shew me thy conceit, what thou thinkest therein.” Thus speaks the civil lawyer: the Student then says, “I think, that if the freehold be in the King, he may assign the tithes thereof to whom he will: and if the freehold be in a common person, that he may do likewise. But then (he continues) I think, that if that common person do not assign the tithes so as it may stand conveniently to the maintenance of the service of God, that the Parliament may do it, and order the tithes to the increase of God’s service, as they shall think convenient.” Then the Doctor says, that he thinks these things ought to be ordered by the Archbishop, to which the Student replies, “Though tithes be spiritual, yet the assignment of the tithes to other is a temporal act, which the Parliament, with a cause, may order, as it may do all temporal things within the realm: and that the King, or any other that hath the freehold of such waste grounds as be in no parish, may assign the tithes thereof to whom they will, it may appear thus: Before parishes were divided, and before it was ordained by the law of the Church, that every man should pay his tithes to his own Church: every man might have paid his tithes to what Church he would, and might one year have given it to one Church, and *another year to another, or have granted them to one Church for ever, if he would. And like as every man before the said severing of parishes, might have given his tithes to what Church he would, because he was bound to no Church in certain: so

[*64]

[*65]

THE
ATT.-GEN.
v.
LORD
CARDLEY.

may they do now that have lands that lie in no parish ; for they be at liberty to assign them to what Church they will, as all men were before the said law made, that tithes should be paid to the proper Church : ” afterwards, he says, “ In the twenty-second year of King Edward the Third, in the Book of Assize it appeareth, that the King granted the tithes of certain asserts that were newly taken out of the Forest of Rock, to a provost, and he thereupon brought a *scire facias* against divers that took the said tithes, returnable into the Chancery : and there exception was taken that the suit pertained to the Spiritual Court, and not to the Chancery ; and it was answered again, that that was to be understood where the suit was taken against them that ought to pay the tithes, and not where it was brought against them that were wrongful takers of the tithes. And thereupon the defendants were put to answer, and pleaded unto an issue, which was sent drawn into the King’s Bench, to be tried according to the law, and there the defendants made default : whereupon the plaintiffs prayed execution. And in this case Thorpe said, ‘ That the old law hath been alway, that the King should assign the tithes where he would. ’ ” Such, then, is the doctrine found here—that if there were land not within a parish, the owner of the land has a right to assign *the tithes as he chooses, as he might originally at common law, as persons have imagined. But it seems to me, that the authorities which I have mentioned before, are superior to the authority of the “ Doctor and Student ; ” and therefore I have drawn that conclusion which I have stated. Although I do not think it at all necessary, for the determination of this case, that I should have gone into the question so far as I have done upon this point, yet I thought I owed it to the counsel for the defendant, who have displayed great learning throughout the argument, to say thus much with a view to settle the law. In this particular case, however, we must remember that the King had the freehold of all these lands ; and therefore, even according to the supposition in the “ Doctor and Student, ” he might assign these lands as he pleased ; and he has assigned them, as Mr. *Attorney-General* says, and as indeed the defendants say also, only they insist on an assignment to other persons than the Crown lessees. So that

[*66]

THE
ATT.-GEN.
v.
LORD
HARDLEY.

taking it either way, according to the doctrine laid down in the “Doctor and Student,” it takes from the defendant in this case at least the advantage which he might have derived under other circumstances from the proposition urged in argument on his behalf, that the King is not entitled to the tithes of lands which are extra-parochial.

If then we have established that the tithes were originally in the King, and, by originally, I mean when these tithes arose, that is, when the lands in question were newly recovered from the sea, or from *the water: we then come to the part of the case which raises the question, whether the Crown has granted away these tithes to any one else or not? For the defendant, it is said, that it is immaterial to whom they have been granted; for, if granted at all, they are no longer in the Crown: and the very statement of the case, supposing the observations I have made upon the law, taken from the “Doctor and Student,” to be incorrect—the very statement of the case, which I am about to make, will shew that that cannot apply to this case; and it will shew that it is merely a matter of speculative research, in this instance, to enquire whether the King is entitled to extra-parochial tithes or not; for it is clear that he was entitled to these tithes beyond all doubt. Even the defendants say, that he granted them to their predecessor, from whence it must be concluded, that they admit that his Majesty was entitled to them: and they accordingly mainly rely upon the title which they claim under the King, namely, the grant of the Crown. They surely then cannot say that the King has never exercised any act of ownership over these tithes, and that he could not grant leases of them. Therefore, taking it from the statement of this case, on one side or the other, it is clear that his Majesty was seised of these tithes at the time of the Restoration; and that at once equally puts an end to any difficulty that might have arisen upon the question, whether the King is entitled to extra-parochial tithes or not? I consider however that I have shewn there is no doubt but that he is entitled to them, and that he may deal with them *as owner, as an ecclesiastical person may, because he is *persona mixta*.

[*67]

[*68]

[His Lordship then, with great minuteness and particularity,

THE
ATT.-GEN.
v.
LORD
KARDLEY.

went through the whole of the documentary evidence, consisting principally of grants from the Crown of the lands in question, and of leases of the tithes by the Crown from time to time, and a decree of this Court (Easter Term, 1714) of an account of the tithes in favour of a Crown lessee, founded upon the lease: all of which, he observed, being in effect a continued exercise of ownership on the part of the Crown, and not contested by any one, afforded the strongest evidence that the tithes were not intended to pass, and did not pass by virtue of the grant of the land to Lord Torrington; and that throughout the whole tenor of that grant, there was nothing which could be taken to relate to any thing but the land itself.]

[*69]

Then (continued his Lordship) a question arises upon the construction of this grant to Lord Torrington: and in opposition to the case, as I have stated it, on the part of the Crown, fortified as it is by the usage, the granting of the leases, and the establishment of the lessee's right under them in a suit in equity against persons claiming under this very grant, it requires a very strong case indeed to shew that the tithes passed from the Crown to any person by any other mode than under those leases. This grant is certainly, however, a very important document. It was made on the *14th of May, 1690, which was in the second year of the reign of King William and Queen Mary. Before I enter more minutely upon the question of its construction and operation, I will first observe, that with respect to the words used in the introductory part of it, namely, "Our will and pleasure is and we do hereby of our more abundant grace certain knowledge and mere motion"—that there is no doubt, and so far I entirely concur with the observation of the counsel for the defendants, that they have a virtue inherent in them, which gives, in some respects, to grants of the Crown, a more favourable latitude of construction in behalf of the grantee than would have place, if those words were absent; and I have no difficulty in construing this grant of the Crown, in the present case, as I would a common conveyance between man and man. At the same time, however, I must observe, that I consider there is a difference even where those words are used; although I do not at present mention that so much as being applicable to this case,

THE
ATT.-GEN.
v.
LORD
EARDLEY.

as to prevent any further misconstruction of the opinion which I am delivering; therefore I repeat, that I hold there is certainly a difference between a grant of the Crown even with those words, and a grant made between subjects.†

The Crown, by this instrument, grants to Lord Torrington all these parcels of lands (describing them particularly), being part of the great level called Peterborough or Bedford Level, *which said premises (it recites) were by indenture of the late Queen, and her then trustees, bearing date the 6th of November, 1688, demised to Lord Viscount Castleton, for the term of twenty-one years, at the yearly rent of 323*l.* 8*s.* 9*d.* Then, after specifying other parts of the premises and former leases and grants of them, it has first these general words, “and also all and singular other grounds, lands, tenements, and hereditaments, parcel of the 10,000 acres in Peterborough Level.” Those well-known words could not, as I conceive, *per se*, pass tithes, which no doubt are a particular species of property; for they do not belong, nor are they appurtenant to land: they are collateral to the land, and are quite distinct from it. So far therefore we see clearly that nothing was granted here but that which had been granted to the Duke of York, and by him when he became King to his Queen, without any reference whatever to tithes—“which in and by the said recited letters-patent of our said Royal Uncle King Charles the Second, were granted or mentioned, or intended to be granted to the said late King James the Second, when he was Duke of York,” and so on. It is likewise clear that those lands were of the yearly value of 3,000*l.* [His Lordship then read the general words, as in 8 Price, p. 45, and various other parts of the grant, making occasional comments on the tenor of the language of the instrument, the substance of which was, that there was nothing from which it could be collected that any conveyance of the tithes to the grantee was intended, every part of it appearing *to be applicable to land only; and he observed particularly on the fact, that the tithes were in lease when the grant was made, and new leases were granted as often as they reverted.]

Now, I confess (continued his Lordship), when I read this

† Vide *Rex v. Capper*, 19 B. R. 568, 597 (5 Price, 217, 260).

[*70]

[*71]

THE
ATT.-GEN.
v.
LORD
EARDLEY.

grant through, I found it utterly impossible to persuade myself that it was intended to pass the tithes in question under these words,—“all gardens and orchards wastes tithes oblations obventions waters and water courses,” and so on. I consider them as meant to carry the appurtenances of the land, though very inaccurately used for that purpose certainly. [His Lordship had observed, in the course of the argument, that the words “oblations and obventions” being also used in the same place amongst the general words, in a grant of extra-parochial lands, shewed that the whole must have been introduced by inadvertence, or at least without any intention to pass the tithes.] We can only therefore, as it seems to me, understand that the grant applies itself entirely and solely to the land, notwithstanding the introduction of the word “tithes.” It describes the 10,000 acres which were granted to the Duke of York, and afterwards by him to his Queen—it represents the value to be 3,000*l.* a year, which is the value of the yearly rent, all obviously relating to the lands; and the language throughout is inconsistent with any idea that tithes were part of the object of the grant, or that they were intended to be passed by the word “tithes:” the grant expresses reversions in general terms; but *those were reversions in the land; and not one word is said as to any reversionary interest in the tithes, which were undoubtedly then in reversion. Now if, in addition to all this, we consider that so soon after this grant was made, a successful suit was instituted by Sir John Shaw, the lessee of the tithes, against the occupiers of the lands, it seems to me to be very difficult indeed to suppose that the tithes were intended or considered to be passed. When we consider the defence, and the result of that suit—every thing belonging to it shews, that in the minds of the parties most interested there was a conviction, that the tithes had not passed, but were the property of the Crown in reversion, although in the hands of the lessee at that moment. I cannot help regarding the result of that suit as a kind of contemporary judicial construction of the grant, supposing that construction to be more difficult than it really is; and I cannot, with the evidence I have before me (if there be any other I cannot act upon it), hesitate to pronounce, that in my opinion the title of the Crown to the

[*72]

THE
ATT.-GEN.
v.
LORD
EARDLEY.

tithes of these extra-parochial lands was perfect down to the expiration of Sir John Shaw's lease; for so it appears to me to have been, beyond all doubt.

Here arises the question whether the reversion passed, the tithes being in the Crown at the time of the grant to Lord Torrington. We ought to observe, that there is no suggestion of any tithes being received or abandoned by Lord Torrington before the present suit. The tithes after the expiration *of Sir John Shaw's lease reverted to the Crown: and it should be always remembered that when the grant was first made to Lord Torrington, the tithes were under lease to Berkley and Gascoigne; but at the time when the next lease was made, the tithes were actually in the Crown. After the observations I have made respecting the grant to Lord Lincoln, and his conduct pending the suit, I need not repeat that I consider it very strong evidence, and, in the absence of any evidence to oppose it, quite conclusive of the then acknowledged right of the Crown. I do not mean to say, that if there was any other evidence to oppose it, it might not be answered; but there being none brought before me, that is the conclusion which I must draw in the present case.

[*73]

[The LORD CHIEF BARON then went into the question which had been raised upon the Nullum Tempus Act, and held that evidence shewed that the tithes had been kept in charge so as to bring them within the exception of the Act of George III. He concluded:]

I must therefore decree against all the proper parties, according to the prayer of the bill.

[80]

As to Lord Eardley, I do not know of any instance of the Court calling upon an individual, *under the same circumstances, to account. He admits, it is true, that he occupied part of the lands on which there was a decoy; but I am not aware that wild ducks have ever been held to be titheable.

[*81]

DECREE.

That the defendant, Lord Eardley, go without day, as to the claim for tithes against him in the information mentioned.

THE
ATT.-GEN.
v.
LORD
EARDLEY.
[82]

Refer it to the Deputy Remembrancer, to take an account of the tithes claimed by the information against the other defendants, from six years prior to filing the information, as to those persons who became occupiers prior to that period: and as to the other persons from the time when they respectively became occupiers, to be paid by the defendants—with the usual reference as to the executors, &c.—and with all usual directions.

1820.
Jan. 26.

[89]

EXCH. HILARY TERM.

THE ATTORNEY-GENERAL v. THEAKSTONE AND ANOTHER.

[ON A SEIZURE OF A VESSEL CALLED THE *JAMES*.]

(8 Price, 89—93.)

The “Gazette” is sufficient evidence of a proclamation issued under an Order in Council: because it is a public act, regarding the Crown and Government, and must pass the Great Seal before it can be admitted into the “Gazette.”

A VERDICT having been found for the Crown on the trial of this information at the Sittings after last Trinity Term,

Jervis, in the course of the following Michaelmas Term, obtained an order (upon a motion for a new trial) that the matter should stand over, and that the entering up of the judgment should in the mean time be stayed until further order.

The information was filed for the condemnation of the defendants’ vessel, on a forfeiture under the 33 Geo. III. c. 2, s. 4,† for having on board, whilst loading for Pernambuco, gunpowder, an article at that time prohibited, by proclamation under an Order in Council, to be exported or carried coastwise.

The cause having been called on for trial, and the case stated to the jury, the “Gazette” of Tuesday, the 26th May, 1818,

† Rep. 6 Geo. IV. c. 105.

(wherein the Order in Council in question was published) was put in and read, upon which

THE
ATT.-GEN.
v.
THEAKSTONE

Jervis objected that it was usual and necessary to prove the Order in Council, by production of the *original, and by proof of the handwriting of the Lords of Council, stating, that in a great many cases of impressing seamen (the authority for which is an Order in Council and a proclamation) the original order had always been produced. [*90]

In answer to that objection the case of *The King v. Holt* † was cited, in which the Court of King's Bench decided on the argument of that objection, that addresses of bodies of subjects offering their loyalty at the foot of the Throne, and received by the King in his public capacity, became acts of State, and as such acts are announced to the public in the "Gazette," the "Gazette" is an authoritative mean of proving it, as it is an act relating to the King and the State.

The CHIEF BARON however observed, that to obviate the doubt as to the legality of the mode of proof, he would rather have the Order in Council itself proved; and a witness from the Council Office was called for that purpose. He produced the original draft of the minute of the order, which he stated to be the only document remaining in the office, and that the paper was considered in the office as the original Order in Council. It appeared however on his cross-examination, that the paper produced was the same draft that had been prepared in October, 1817, when the previous order prohibiting the exportation of gunpowder was made, and that the paper was again *used as the draft of the further order for the same purpose, in May, 1818, when the previous order expired. He also proved, that such orders are not signed either by the Prince Regent, or the Clerk of the Council in waiting: and that the name of the Clerk is only attached to the minute of the order, for the purpose of shewing that he was in attendance at the time when it was made. That from the rough draft of these orders different [*91]

† 5 T. R. 436.

THE
ATT.-GEN.
v.
THEAKSTONE

copies are issued to the Commissioners for executing the Office of Lord High Admiral, the Wardens of the Cinque Ports, and other officers of State—that the one produced was the original and only minute of the order deposited in the Council Office, and that no entry of it had yet been made in the books.

The CHIEF BARON ultimately told the jury, that he had thought it proper for the present to overrule the point made by the defendants' counsel and when the period should arrive that the question could be discussed, the defendants would have all the advantage that could be derived from the objection which had been taken,—that there was nothing for the jury to consider,—and under these circumstances he directed them to find a verdict for the Crown, which was accordingly done.

[*92]

The claimants having afterwards brought an action against the person who was said to have put the gunpowder on board, without the consent *or knowledge of the claimants, it came on to be tried at the last Lancaster Assizes, and a verdict was found for the plaintiffs (the present defendants) for 1,500*l.*, subject to the opinion of Mr. Baron Wood and Mr. Justice BAYLEY, whether the "Gazette" was legal evidence of the Order in Council.

Jervis, in the course of last Michaelmas Term, moved for a new trial, on the ground of the objection taken by him at the sittings, when

The LORD CHIEF BARON observed, that he had himself no doubt upon the point that the "Gazette" was evidence of the proclamation, because, before it can be inserted, it passes the Great Seal; and he stated that he had been informed, that it had been admitted in evidence under similar circumstances in a very highly criminal case. His Lordship also added, that in conversation with a very learned person, who had been Attorney-General for many years, he had learnt that it had been so decided in his time, when it was much doubted by persons who had afterwards admitted that there was no solid foundation for such doubt.

GARROW, B. suggested, that as the same point had been reserved at Lancaster, it would be proper and convenient that the matter should await the decision in that case, when it might be mentioned again.

THE
ATT.-GEN.
v.
THEAKSTONE

That suggestion being adopted, the Court granted the rule which, [93]

Clarke now prayed might be discharged—submitting that this was the only instance in which such an order had ever been made by the Court: and he urged, that it would be of mischievous consequences as a precedent, if it were allowed to stand; for it might have the effect of delaying the judgment of the Crown indefinitely. The Judges who tried the cause at Lancaster might think proper to wait for the determination of this Court; and the parties in that cause might, after all, bring a writ of error; while in the mean time a considerable expense was incurred by keeping charge of the vessel, which was daily decreasing in value.

Jervis stated that he did not oppose the motion, the point having been disposed of.

Per CURIAM:

Order discharged.

1820.
Feb. 3.
[127]

OLIVER AND WIFE, AND THEIR HEIR-AT-LAW *v.*
COURT AND OTHERS.

(8 Price, 127—173; S. C. Daniell, 301.)

An auctioneer employed to sell cannot on equitable principles be permitted to purchase the property himself.

If the person so employed has also been in other respects connected with the interests of the vendor, as by having been concerned in valuing the property, and purchases the estate the next day by private contract, where the property was not sold at the auction in consequence of no bidding having been made, and no satisfactory account of the proceedings of the day be given by the auctioneer in his answer to a bill filed against him as purchaser, the purchase will be set aside; for in such a case the Court will consider that the duties of an agent so circumstanced were not concluded with the mere business of the day.

[*128] THE plaintiffs filed this bill in Trinity Term, 1815, against the defendants, the principal *of whom, (Court) was the purchaser of the plaintiff Oliver's life-interest in the estate in dispute: the others were the trustees of the plaintiff appointed under a conveyance of the estate, executed by him for the benefit of his creditors—and certain incumbrancers on the estate since the defendant Court had been in possession. The bill prayed a discovery; and that the purchase (made in 1800) might be declared fraudulent, and therefore decreed to be set aside, and the conveyances delivered up to be cancelled: the plaintiff Oliver offering to repay the purchase-money with interest to the defendant Court, upon his accounting for the rents and profits whilst in possession.

[129] It was also prayed, that in taking the account the defendant Court might be charged with a full and fair rent for the premises, and for the full value of all the timber cut by him; and be decreed to pay to the plaintiff what should be found to be due to him on taking such accounts; and also that the defendant might be decreed to account for all waste committed by him—and for an injunction, restraining him from committing further waste on the premises.

The bill stated that the plaintiff, being seised, &c. by articles of settlement (in 1787), before his marriage, covenanted to convey

to trustees a certain freehold estate in the county of Worcester, of the yearly value of 183*l.*, to the use of himself for life, without impeachment of waste, except voluntary waste in buildings, remainder to his wife for her life, with power to lease, remainder to their children, in such shares as plaintiff should appoint, and in default to the trustees for a term of 200 years, for raising portions for younger children; and after and subject thereto, to the sons and daughters in strict settlement, with remainder to the use of the right heirs of the plaintiff—that in March, 1799, the plaintiff having become embarrassed in his circumstances, had conveyed certain other real estates of which he was then seised to two of the defendants in trust for the benefit of such creditors as should execute the deed—that the trustees caused the said estates to be advertised for sale by public auction, and frequently offered them for sale by *private contract, without being able to procure any thing near the price at which they had been valued by the surveyor employed for that purpose, and that the plaintiff owed at that time considerable sums to persons not parties to the above deed of March, 1799.

OLIVER
v.
COURT.

[*130]

The bill then stated that the plaintiff being by virtue of his said marriage settlement entitled to a life interest in the settled estates, with reversion in fee to himself on failure of issue of the marriage, conveyed all his estate, right, title, and interest in the same, by indenture of the 16th May, 1801, to trustees (the same persons as had been appointed by the deed of 1799) in trust also to sell for his creditors, reciting, as part of the consideration of such deed, that he was to be paid or allowed an annuity of 150*l.* during his life, and subject thereto upon trust to sell the plaintiff's interest in the property, to pay the proceeds to the unsatisfied creditors, and the surplus, if any, to himself.

It further stated, that, previous to 1799, the father of the defendant (Richard Court) carried on the business of land surveyor and agent, in copartnership with his son; and that in 1801 they were employed in that character, by the trustees in the last-mentioned deeds, to survey, measure, and value all the estates so conveyed by the trust deeds: and that during the year 1801 they frequently surveyed and measured the property; and the entire management of it, for the purpose *of sale, was

[*131]

OLIVER
v.
COURT.

committed to them by the trustees, as their confidential agents—that the defendant Court afterwards took another person into partnership, but that he still continued to conduct the management of the property for the purpose of selling it, by means of which employment he acquired an intimate knowledge of the trust property and its value—that in February, 1802, the property, which was the subject-matter of the deed of 1787, was put up to sale by public auction, upon which occasion the defendant Court acted as the auctioneer in the employ of the trustees; but that the defendant having then formed an intention of purchasing the property himself, by contrivance, prevented any sale from taking place; and on the next day, or the day after that, himself made proposals to the trustees to become the purchaser of the property, and afterwards entered into a contract with them for the sale thereof to him, at a very small and inadequate price, namely, 500*l.* for the whole, including a large quantity of very fine and valuable timber trees, growing upon the land, to an amount in value of 700*l.*—that in April, 1802, the trustees let the defendant Court into possession of all the said trust estates comprised in the deed of 1787, which he had held ever since: and that he had committed great waste thereon, by cutting down trees calculated for ornament and shelter, by pulling down walls and part of the mansion-house, ploughing up pasture, and other means, damaging the estate to an extent in value of 500*l.*

[132]

It was also alleged, that the defendant Court soon afterwards borrowed 800*l.* of the defendant Waldron on security of the said life-interest of the plaintiff by way of mortgage, and that the deed was executed by the trustees, whereby he had become an incumbrancer at the time of filing the bill to that extent—that he (defendant Court) had also entered into an agreement for a lease of the premises with defendant Stokes, and had received from him 400*l.* as a consideration for such agreement—that they had both had notice, and that application had been made to all the defendants to deliver up possession on repayment of the money paid by Court to the trustees, which they had refused to do.

The bill then proceeded to charge various acts, letters, bills of charges for business done (in surveying, valuing, and super-

intending alterations and preparations, and arrangements for selling the property, &c. &c.) and conversations, in support of the foregoing statements, and in explanation of the relative situation of the parties, the nature and extent of the transactions between them—making out a strong case of means of knowledge of the property and its value on one side, and of submission and confidence on the other. It charged also, that the property was worth very considerably more than the money paid by Court, and that it had recently before the sale, been valued by himself at 235*l.* per annum, and that it was worth about 1,400*l.* or 1,500*l.* Then, suggesting *pretences, that the plaintiff Oliver had subsequently confirmed the purchase by deed, the plaintiff charged, that he did in fact execute some deed purporting to be a conveyance of his interest in the premises, but that he was at that time, and had been for a long time before, residing in the Isle of Man, for the purpose of avoiding his creditors, in consequence of being greatly involved and embarrassed in his pecuniary circumstances, and that he executed such deed at the desire and instance of the trustees, who had threatened him, by letter, written by defendant Hill (one of the trustees), that, unless he executed it, the annuity of 150*l.* would be no longer paid to him; in which letter Hill gave him permission to draw on him for money to pay his expenses of the journey—that the deed was executed under the influence and control of the trustees, and that at the time of executing it the plaintiff did not know that the defendant Court was the purchaser of the estate; and that the whole was the effect of duress, fraud, and confederacy.

Finally—after suggesting a pretence, that if the plaintiff had at any time had any good ground of objection to the purchase, it ought to have been raised long before the bill was filed—it charged, that ever since the year 1802 the plaintiff had been in indigent and distressed circumstances, and in want of the means of commencing a suit, and that but for utter inability, the consequence of such distress, he would have proceeded long before to have set on foot a legal inquiry as to the *merits of the transaction. It also charged, that all the creditors had been paid the full amount of their composition of 17*s.* 6*d.* in the pound.

The bill was afterwards twice amended.

OLIVER
v.
COURT.

[*133]

[*134]

OLIVER
v.
COURT.

The answer of the defendant Court, stated, that he had paid the full value of the premises bought by him of the trustees; that during the years 1801 and 1802, the defendant's father was employed on his sole and separate account by the trustees, in surveying and valuing the trust premises, and that he had nothing to do with any thing concerning them but the measuring, mapping, and planning—and that William Roberts (defendant's then clerk, and afterwards his partner) also occasionally assisted defendant Court's father in the measuring, mapping, and planning. In his answer to the amended bill, he stated, that he had dissolved partnership with his father in 1797, and that during all the transactions, in the bill stated, he was not a partner with his father, and only occasionally assisted him in his business as his agent; denied that he or his father were directed to endeavour to sell the estate so purchased, except in his (defendant's) capacity of auctioneer, and that only because his father was not qualified to act as an auctioneer: and he also denied that he was the confidential agent of the trustees, or that he had the management of the estate (which, he alleged, had been wholly confided to the solicitor of the trustees in that respect), or that he or his father had acquired any full or complete knowledge of the *property, beyond what they obtained in their employment as measurers and valuers, all of which information, at any time so acquired, had been by them communicated fully to the trustees: and that no advantage was taken of such knowledge in making the purchase.

[*135]

Then (having denied any intention to become a purchaser at the time when the estate was put up by him to auction on the 6th February, 1802), he admitted being desirous of purchasing it about the next day (but he did not know the exact time), and stated that he then proposed to purchase the estate at 500*l.*, if no higher price could be got by the trustees before the estate should be conveyed to him; and he also admitted his subsequent purchase, as charged; insisting, however, that the consideration paid by him was the full value, and not an inadequate price. He alleged that it was not till twelve months after the time when he entered into such verbal and conditional contract, that the estate was conveyed to him: and that he believed that

no better offer had in the meantime been made to the trustees; and that the consideration money (500*l.*) was paid on the execution of the conveyance which was then executed by the trustees in April, 1803, and in a short time afterwards by the plaintiff.

[In his answer to the amended bill he admitted, that it was no part of the agreement, that the trustees might, notwithstanding, sell the estate to any one else who should offer more money for it, —and that *he was let into the possession about a year before he paid his purchase money.]

OLIVER
*
COURT.

[*136]

He admitted that the annual value was 232*l.*, according to his father's valuation, but alleged, that it was subject to heavy charges and outgoings, as the said annuity of 150*l.*, 10*l.* 5*s.* 7*d.* per annum for land tax, 10*l.* per annum for repairs, and 1*l.* 3*s.* 8*d.* for chief rent; that he had since his purchase laid out 300*l.* in improvements, and that he had paid a large premium on insuring the plaintiff's life, which, with other matters stated in the answer, had left the defendant, as he calculated, only 23*l.* 10*s.* 9*d.* clear annual income for the risk of his purchase money, the then gross rent of the settled estates being not more than 235*l.*; that the land was very foul and out of condition, the buildings dilapidated, and the poor rates and taxes high, at the time when he made the purchase.

The defendant Court, therefore, on the facts stated, submitted, that the plaintiff had not made out a case for relief: and insisted strongly on the great length of time which had been suffered to elapse before this suit was instituted, and on the intermediate acquiescence of the plaintiff—of all which matters he claimed the benefit, as if he had pleaded it in bar of the discovery and relief sought by the bill.

He denied waste, but admitted cutting down trees worth 6*l.* for repairs—that Stokes had become *his tenant of the premises and that he also had cut down some small trees, neither ornamental nor affording shelter, for the sake of enlarging the garden, and worth about 5*l.* [In his answer to the amended bill, however, he admitted that Stokes had ploughed up grass lands,—and he also admitted making alterations in the buildings, but denied having done any injury, alleging, on the contrary, that he had thereby greatly improved the property.] He suggested, as to

[*137]

OLIVER
v.
COURT.

the timber, that he had purchased all the interest of the tenant for life in the premises; but by his answer to the amended bill, in which he admitted it to be worth 300*l.* or 400*l.*, he stated, that he did not consider it as belonging to him under the purchase of the estate, except as far as the same should be necessary for repairs and improvements; for that the timber had not been estimated by him, in his calculation of the value of the estate, when he had estimated it at 500*l.*; and that he did not consider that he had any right thereto save as aforesaid, submitting, in that respect, to the judgment of the Court.

[*138]

The defendant also alleged, that the trustees were informed of the valuation of the property as made by his father, and that it had been delivered to them in writing—that the creditors were also apprized thereof, and that they had subsequently had several meetings with the trustees upon the subject, during the course of arrangement of the plaintiff's affairs. The answer then, (denying that the plaintiff was so embarrassed in circumstances *as he had represented himself to be, having at least the said annuity and the pay of a commission in the Manx Fencibles) admitted, that he had till within the last two years resided in the Isle of Man, as defendant believed, to avoid his creditors. [In his amended answer he admitted the lease to Stokes, and that he agreed to pay a rent of 235*l.* for the estate so purchased by defendant, and for another farm then rented by the defendant; and in his answer to the re-amended bill, he stated that the said other farm was held by him on lease, at 40*l.* per annum, and that Stokes was to pay him a premium of 400*l.* for such lease.] He also admitted the mortgage to defendant Waldron for 800*l.*, which he stated was secured by assignment of the said interest of plaintiff and the policy of insurance on the plaintiff's life for that sum.

The trustees, by their answer, denied that they had directed the defendant Court or his father to sell the said trust estates; or that they had in any other way employed the father than as a surveyor, or the son than as his assistant and as an auctioneer, having in all other respects committed the confidential management of the estates to their solicitors. They admitted that the

OLIVER
v.
COURT.

Courts had obtained full information of the said trust estates, and of their value, &c. by means of their duty in the course of such employment, and also the agreement with the defendant Court, for the sale of the estate in question, at the time mentioned in the bill, for the sum of 500*l.*, which *they stated they considered a fair and adequate price, and that it was not worth 1,500*l.*, regard being had to its being subject to the annuity of 150*l.*,—and they denied that the complainant had paid or satisfied the creditors. They also denied using any undue influence to procure the execution of the conveyance to Court by the plaintiff.

[*139]

On the part of the plaintiff, it was proved by his first witness that the defendant Court and his father appeared ostensibly to carry on business together as partners from 1796 to 1803; that the estate in question was well timbered and in good order, and that the mansion and buildings were in good repair in 1802; that at present, some of the timber had been felled, some of the pasture ploughed, and the house and buildings in much worse repair. He also deposed (having stated himself to be a person competent to make an estimate, as he had himself bought and sold estates, and farmed and occupied his own lands) that in 1802 the estate in question, consisting of 102 acres, was worth, for the life of a man of the age and health of the plaintiff, who was then forty-one and now fifty-six (some of the witnesses said fifty-eight or fifty-nine), about 4,800*l.*, being twelve years' purchase at 300*l.* a year, and allowing 700*l.* for the timber to which the plaintiff, as tenant for life without waste, was entitled,—and he stated, that in 1802 he had himself rented land in the neighbourhood of similar quality, at from 3*l.* to 4*l.* per acre per annum. He described the mansion or dwelling-house in the pleadings mentioned, *as a large-sized square handsome house, with coach-house and stables, and as a fit residence for a gentleman of large fortune; and he stated, that since 1802, a large circular wall which surrounded the court at the back of the house had been taken down. Many other witnesses were examined, the general effect of whose testimony was to prove, that at the time when the plaintiff quitted the estate, and in 1802,

[*140]

OLIVER
v.
COURT.

the house was in complete and ample repair, the lands well ordered and cultivated, and a quantity of fine timber growing on the estate; that the complainant left the country in a very embarrassed state of circumstances and greatly in debt, in or about the year 1802—that since, and whilst defendant Court first occupied the estate, the general condition of the property became deteriorated; and that, afterwards, when the defendant Stokes (then about twelve years ago) became the occupier of all the estate except the house, great waste was committed during his occupation in cutting down ornamental timber, ploughing up sound old pasture land, and by general bad husbandry, until he finally deserted the premises about two or three years ago—that they then became obviously in all respects in a very ruinous state; but that of late (about a year ago) the defendant Court had resumed the occupation, and had since been laying the foundation of great improvement, yet it would be many years before the property could be restored to the condition in which it was left in 1802. Many of the witnesses (all who spoke to the same facts) confirmed the statement of the first witness, as to the original *value of the property, and the great depreciation since, in consequence of waste and bad management.

[*141]

On the part of the trustees, their solicitor proved that he was employed on their behalf, and that of the other creditors of the complainant, to conduct the business of the execution of the deeds of 15th and 16th May, 1801, and the sale of the trust estates for their general and common benefit—that most of the trust property (five out of eight lots) was sold by public auction, on the 6th February, 1802, and that the three other lots were afterwards sold by private contract, amongst which was lot eight, the estate in question, which was sold to Court for 500*l.*, and that, in his judgment, all the said estates were sold for the best prices that the trustees could get for them.

[After argument, the COURT took time for consideration.]

Feb. 3.

[152]

The LORD CHIEF BARON now delivered his judgment, which he preceded by succinctly stating the situation of the parties to the

suit, the general nature of the case, and the substantial object of the bill.

OLIVER
v.
COURT.

(His Lordship then gave the following exposition of the facts, as appearing to him to be the fair result of the evidence in the cause.)

The plaintiff was clearly entitled, under his marriage settlement, to an estate for life in the *premises in question, without impeachment of waste. Having become involved in insurmountable difficulties previous to March, 1799, he conveyed certain of his real estates to trustees for the benefit of his creditors, in order that they might be sold, and the produce applied in discharge of his debts, and in extricating him from his embarrassments. Continuing, however, to be still pressed by his creditors, who were not included in that arrangement, and his difficulties increasing, in May, 1801, he conveyed the estates which had been settled on his marriage, to the same trustees, and for the same purpose, that of sale for the benefit of this second class of creditors, the residue, if any, to be paid to himself of course. Now, the plaintiff being tenant for life without impeachment of waste, had certainly a right to cut timber, and, therefore, provided he did not commit equitable waste, he was entitled, as part of his interest, to commit what is called legal waste, subject to the restriction of a court of equity. That right was of course, as incident to his estate in the premises, transferred by him when he so conveyed his interest in the property to the defendants (the trustees), in trust, as I have stated, for the benefit of his unsatisfied creditors. [His Lordship then set forth the particulars, and the object and effect of that conveyance.] That very deed proves sufficiently that the plaintiff was, at the time when he executed it, in very embarrassed circumstances. He reserved to himself by that deed certainly a rent-charge of 150*l.* *per annum, and subject thereto he conveyed his whole interest in the estate to these trustees for the purposes which I have already mentioned.

[*153]

[*154]

It appears that afterwards, when the plaintiff had withdrawn to the Isle of Man (where embarrassed persons found, at that time, a greater protection as to their persons on such occasions than at present), for the avowed purpose of avoiding his creditors,

OLIVER
v.
COURT.

the trustees took measures for effecting a sale of the conveyed estates. With that view, and as a preparatory step, an admeasurement and valuation of all the trust estates took place during the year 1801, by the direction of the trustees. That admeasurement and valuation was undoubtedly made by the Courts, father and son, in conjunction. It certainly does not appear distinctly what precise part the defendant Court himself bore in that matter: but he admits his concurrence and co-operation with his father, who (he states) took upon himself the valuation in performing that service. He then tries to distinguish the nature of his part of the undertaking from that of his father, who, he says, took upon himself entirely and exclusively the valuing, leaving to the defendant the measuring, mapping, and planning. It appears, however, quite manifestly, from the papers relating to that transaction, and even from the pleadings on the record, that beyond all doubt, the defendant knew what had been done in every stage of that business, and, of course, the result of the survey; for although he might *not, perhaps, have been actually in co-partnership with his father during the whole time, it really is not of much moment whether he was or not, he must have had the same opportunities as his father had, whom he assisted throughout, of observing and noticing all those matters which were best capable of furnishing him with information on the subject of the real value of the estate during the progress of the admeasurement and the estimate.

[*155]

Now it is a most important fact in this case, that in the valuation which was then made no notice was taken of the timber; and in that respect great negligence is imputable to the trustees in not having required that omission to be supplied by the defendant and his father, or in not having apprised the plaintiff of the circumstance, or not advertg to it themselves when they sold his interest in the premises. It is, however, quite clear, that the timber was not valued, and that was beyond all doubt, in this case, a necessary subject-matter of consideration in forming a true valuation of the plaintiff's interest in this estate such as it was. So very material a subject-matter of calculation was it, that without an estimate of it, the real value of his interest could not be ascertained. In point of fact, the

value of the timber is not, at this moment, known exactly; but from all the evidence, and even from the pleadings, it is clear that it was, with reference to the sum given for the purchase of this estate, very considerable, *amounting to at least something between 700*l.* and 800*l.*

OLIVER
v.
COURT.

[*156]

It does not appear either, to what extent the valuation which had been made of the average annual produce of the estate, such as it was, is correct or true; for the statement in that respect is not supported by any evidence, or, at least, by any that satisfies me; and the allegations on the record, and the witnesses who speak to that point differ much in the estimation put upon it. One of them in particular, who appears to have been well qualified to give an opinion, states it at much higher; and there is no witness examined on the part of the defendant as to the correctness of the valuation made and reported by the surveyor employed for that purpose, whoever he was; although, considering the other circumstances of this case, that may not, perhaps, be now very material to the plaintiff; but it is very much so, as affecting the defendant Court. He, however, does not even in his answer, offer any thing to support that valuation. Much, indeed, is stated of expenses incurred by him [those his Lordship particularized, reading from that part of the answer.] But there is nothing which approaches the real question of the fairness of the alleged estimate, which is, as I have observed, a matter of great importance to the defendant in this case, for the onus lies on him to shew that the valuation on which he proceeded, is correct and fair, and to satisfy the Court in that respect. But how has that been *done? In the first place it is a material and prominent fact, that one of the incidents to the interest of the plaintiff, of no small magnitude in point of value, was certainly not taken into consideration in making the valuation, and that was the timber. Then the statement furnished by the pleadings is, that the annual value was estimated at 232*l.* 3*s.* 5*d.* which, deducting the rent-charge of 150*l.* would leave 82*l.* 3*s.* 5*d.* and that at eight years purchase would be worth 657*l.* 7*s.* 4*d.*, from which, if a further deduction be made of 10*l.* a year for repairs, which the defendant has stated in his answer to be the average expenditure by him on that account, the value of the purchase

[*157]

OLIVER
v.
COURT.

will amount to 577*l.* 7*s.* 4*d.* Now that calculation is, of course, exclusive of the timber; and if I also take a general average of what has been stated to be the value of the timber, I must put it as high as 300*l.* or 400*l.* at the least—and indeed the defendant Court himself, in his answer to the amended bill, admits, or rather states, the timber to be worth 300*l.* or 400*l.*—a sum which, if added to the total amount of the consideration-money paid by the defendant for the purchase, would alone make a very considerable addition to the true value of the plaintiff's interest in the estate.

[*158]

We find, therefore, that the facts are, that there was a conveyance of all the plaintiff's interest in these premises made to trustees, in trust to sell for the benefit of creditors, and that by a person in the very embarrassed state *in which the plaintiff then manifestly was. Although the conveyance was executed in the month of May, 1801, no valuation was made till the end of that year (December). The sale was then immediately fixed for the 6th of February, 1802, a bad time of the year most clearly for appointing the sale of an estate by auction, and therefore unwisely adopted. It is admitted that the defendant Court was the person who was employed as auctioneer upon that occasion, and it was therefore his business and duty to sell the estate to the best advantage for the vendor. It turns out, however, that although many persons were present attending the sale, there was no bidding offered for this property. Why that so happened we do not know, for there is no information furnished by the party most capable of giving it. The defendant merely says that the estate was put up to auction, and that he acted as auctioneer, and that no one bid a sufficient price. But in fact no one appears to have bid at all. Then he is asked, with propriety, as to the time when he first formed an intention to become the purchaser, and to that he does not think proper to give any satisfactory answer. Indeed, the defendant states his case throughout in his answers in a way which necessarily requires that I should observe upon it. As to most of the particular facts respecting which he is interrogated, he says he knows nothing. As to the time when he first intended to become the purchaser, he says he does not know whether it was

on the day when he put up the estate to sale by auction *or not. In answer to the question of what passed at the auction, he only says that there was no bidding to the best of his recollection and belief. One thing, however, is quite clear, and that is, that he himself offered to become the purchaser of the estate the very next day. Under all the circumstances, then, standing so entirely unexplained,—the defendant giving no sort of account of what passed at the time of the auction,—not stating any thing that was done by himself as auctioneer towards attempting to put up the estate for sale,—nor bringing forward a single witness to give any evidence or explanation of any part of his conduct, or of the business of the day,—surely I may appeal to any one who hears me, or to any man of understanding and plain common sense, whether strong suspicion must not necessarily attach to the conduct of an auctioneer who buys an estate under such dubious circumstances. At the auction by which he was employed to sell the property, there was no bidding for the particular lot, and for that one only; and when called upon for an explanation, he gives no account whatever of any thing which took place upon the occasion as to any effort made by him towards selling at the public sale the estate which he himself proposed to buy, and actually agreed to purchase the very next day by private contract!

OLIVER
v.
COURT.
[*159]

Under such circumstances as these, I cannot but consider myself judicially bound to believe that the defendant Court had determined within *himself, when he mounted the chair, to become the purchaser of the estate which he was engaged as an auctioneer to sell; and I am quite sure that if I were to allow this to be done in the present case, I should hold out encouragement to every auctioneer in the kingdom to take a similar advantage of his own culpable neglect of duty.

[*160]

It was said that there is no legal objection to an auctioneer, although he may have been employed to sell, becoming himself a purchaser afterwards of the very same estate; and that when he has once retired from his duty, he becomes an indifferent person, and is then capable of treating with the owner for the purchase on his own account. I do not deny that in general and ordinary cases he may do so; as where a person, in all

OLIVER
v.
COURT.

[*161]

other respects a stranger, is merely employed for the time as the auctioneer; but I deny that in such a case as this, and under the circumstances disclosed to the Court by this proceeding, he could purchase; because in this case I consider that the person who acted as auctioneer was so connected with the parties that his agency must be considered to have continued after he had descended from the rostrum; for where I see so intimate a connection so long subsisting between parties so situated as these unfortunately were, and find a purchase made of the employer's estate so immediately following an ineffectual attempt to sell, I am bound to say that the party purchased as auctioneer, or at least while his general duty continued. I am clearly of opinion, that an auctioneer, while his employment continues, *cannot purchase the estate which he is engaged to sell: and that opinion is founded on the well-known and established rule of equity, that persons who are in any way invested with a trust, or an employment to be performed by them to the advantage of their *cestui que* trust, or principal, are, *primâ facie*, virtually disqualified from placing themselves in a situation incompatible with the honest discharge of their duty.

The present defendant, however, made the purchase now brought before the Court, under circumstances which are sufficient to disable him from retaining it on many other grounds of objection, each of which would be singly sufficient to authorize a court of equity to set it aside. There are, indeed, so many features of fraud in this case, and they so characterize the transaction of this purchase, as to make it impossible for the Court to withhold its interference in setting it aside.

[*162]

[Having recapitulated the circumstances attending the original admeasurement and valuation.] Now I cannot but suspect (continued his Lordship), that that pretended valuation of the defendant and his father, was, in many respects, actually and in truth, the valuation of the defendant himself; but even if it were not, it was the valuation of his father, whom he admits he assisted in the means of making it, and he was at that time intimately associated with him in the business of *a surveyor, in which he had been a very short time before in actual partnership with him: and soon after, when his father gave up business, he

OLIVER
v.
COURT.

succeeded him, as was natural, upon his retirement, taking the very same employment wholly upon himself, and continuing to act (in consequence, no doubt, of the former connection) in whatever could be done by him in the way of his business in the concerns of this very property. [His Lordship then again adverted to the circumstances under which the offer to purchase had been made, and which was so instantly accepted and concluded.] By that contract the trustees gave the purchaser an interest far beyond in quantity the ostensible and stipulated consideration of the purchase-money, for (independently of the inadequacy of price of the estate itself) they conveyed to him the plaintiff's right to the timber; because, if the contract was a good one in any respect, in buying the plaintiff's interest without reserve, he clearly bought the right to the timber as much as to any other part of the estate, for all the interest, right, and title of the tenant for life were conveyed by the trustees to the purchaser. It is a prominent trait in this case, that the timber was overlooked in the bargain.† Then the value of this property, which had been estimated at 577*l.* 7*s.* 4*d.*, exclusive of the value "of the timber," is pretty clearly shewn by what took place after the purchase. [His Lordship adverted to the important *facts of the mortgage to Waldron and lease to Stokes, &c. as stated among the circumstances of the case.]

[*163]

It was said, indeed, at the Bar, that the including the timber in the purchase (if it were included) was a mistake; for that it was not in fact sold, because not included in the valuation. A mistake I agree it undoubtedly was, in the mildest way of considering it; but, if it were no more, it is precisely that kind of mistake which operates in equity to prevent the person employed as auctioneer to sell the estate, from being himself entitled to be considered a fair purchaser. If the timber was not sold, in point of fact, by the contract, it was in point of law; and the purchaser, if he had a right to any thing under it, would also have a right to the timber by the terms of the conveyance.

But I think I may rest my judgment in this case altogether on the facts in evidence, shewing that the defendant as auctioneer, on the 6th of February, undertook the performance

† *Peacock v. Evans*, 10 R. B. 218 (16 Ves. 516, 517).

OLIVER
COURT.

of a stipulated duty towards his employers (the trustees), that of selling the estate by auction, of the inefficacy of which he does not pretend to give any account, and his own immediate purchase from them of the trust estate: and I may appeal to the Bar, whether there would not be found in that alone, amply sufficient ground to authorize and require a court of equity to set aside a purchase so made, if application had been made recently *afterwards for that purpose, by the tenant for life.

[*164]

The case of *Andrews v. Mowbray*,† which has been relied on for the defendants, is nothing at all like this in its circumstances, nor can the principle of that decision be applied to a case of this kind. That case is very accurately reported, and whatever I may have thought, or still think, of that decree, pronounced by two such learned Judges, I feel myself bound to abide by the doctrine which it called forth, as applicable to the particular facts and circumstances of that case. There are, on the other hand, very many authorities which support, on principle, the power of courts of equity to take cognizance of such frauds as these (and which constantly come before the Lord Chancellor in cases of bankruptcy), and establish that agents, auctioneers, and other persons so situated, are not capable of purchasing,‡ by reason of the duties which they have to fulfil.

On principles of public policy alone, however, I think I might be justified in entertaining the opinion that a court of equity ought not, upon proof of the facts which have been revealed in this cause, to suffer this bargain to stand.

[*165]

Then arises the question whether the length of time which has been allowed to pass before the *purchase was sought to be set aside or complained of, necessarily operates as a bar to a party claiming relief through the medium of a court of equity in such a case as this.

Before, however, I enter upon the opinion which I hold as to that part of the case, I think it necessary to make an observation upon the conduct of the trustees, who are defendants in this case. The circumstances which have been brought before the Court in the course of this investigation, certainly very consider-

† Wils. Rep. 71.

Ves. 381); *Ex parte James*, 7 R. R.

‡ *Ex parte Bennet*, 8 R. R. 1 (10 56 (8 Ves. 337).

OLIVER
v.
COURT.

ably implicate the trustees in the guilt (I do not mean morally) of a total neglect, at least, of the duty which they took upon themselves in accepting the trust from which naturally resulted an implied undertaking to execute it faithfully. That duty they have not in any one respect performed: for—not to repeat what I have already strongly urged on the topic of their having given up the estate in the manner which they did, for so inadequate a consideration so very considerably below the fair value, disregarding the palpable omission, in the alleged valuation, of any account or estimate of the timber—they sold for 500*l.* the property which this distressed man had entrusted to them, and which they knew to be worth 577*l.*; but they did not even then take the common measures to secure to their *cestui que trust* the inadequate fruits of that improvident bargain. Nor can I give them even the advantage of a conjecture that they might have been ignorant of the real value of the property, or of what they were doing throughout; *for, without insisting, as I might do, on its being their duty to inform themselves on matters of so great importance and moment, so gross are the circumstances of this case on the part of the principal defendant, and so negligent have they (the trustees) been in passively suffering them, that I am absolutely compelled, judicially, on the evidence, to impute to them knowledge of all the circumstances which aggravate the conduct of the defendant Court. Then they let him into possession, almost immediately, without his paying a shilling of the purchase money, when they ought to have withheld the possession until it had been paid. They do not require him to pay the purchase money for nearly a year after he took possession, nor do they then demand any interest for the intermediate time during which he retained it in his hands. Throughout all the transactions, therefore, I must say, that I consider the supine conduct of the trustees exceedingly culpable; and however respectable these persons may be in life (and I think that aggravates their conduct), they have in this case been proved guilty of gross negligence and breach of duty. They have, in some measure, identified themselves with the principal defendant the auctioneer, having by their neglect held out a temptation to entice him into a trap, and he has in turn caught them in his.

[*166]

OLIVER
v.
COURT.

[*167]

Nor is it any excuse for the trustee who has not taken an active part on himself in the course of these transactions, that he had nothing to do with the conduct of the other to whom he left the management of the matter ; *for where several trustees leave the entire performance of the duties of the trust to one, all are equally responsible for the faithful and diligent discharge of their joint and several duty by that one to whom they have delegated it.

[Adverting again to other facts in the case, his Lordship then continued:] Even on the facts which are thus stated and admitted upon the record, can any man of plain understanding, for a moment, doubt the gross impropriety of the conduct of the auctioneer, bound as he was by the duties of his situation to take care of the interest of his employers ; and if he has misconducted himself, it is clear that the delinquency of his misconduct must in part attach to the trustees, by whose neglect he has been enabled to do so much mischief: they, therefore, must participate, in some degree, in the consequences. Under the circumstances of this case, I venture to ask, if this contract, so entered into and completed, had been at the time, or within any reasonable period afterwards, brought under the consideration of a court of equity, it could have been suffered to stand for a moment?

[*168]

Then, say the defendants, this transaction took place so long ago as twelve years before the filing of the bill, during all which time, there has been a perfect acquiescence on the part of all persons interested, and no complaint has ever been made. Now—giving every credit to such an argument, to which generally, and in ordinary cases, it would *be entitled, on the solid ground that there may be mischief in disturbing titles sanctioned by long acquiescence of parties interested and who were not ignorant of their rights, as well as on the principle (which experience has for ages justified and which is, therefore, recognized and adopted by the several courts of law and equity in this kingdom) that it is frequently better—where transactions of long standing, originally not well founded, have been suffered to lie dormant—to endure the old injustice than induce a new injury;—I cannot but consider that in the present case there is a very satisfactory

answer to be given to that argument well founded as it is, and entitled to great attention; and that is, that during all the intermediate time which has elapsed between the impeached transaction and the filing of this bill, the plaintiff has been, in consequence of his debts and his poverty, completely *non compos sui*.

OLIVER
v.
COURT.

They say, however, that he came over from the Isle of Man for the purpose of executing the deed, and that he did execute it without making any objection. Now upon that I will state what has occurred to me. The execution of the deed by him was either a necessary or an unnecessary act: if it was an unnecessary act, why should he be brought over to execute it, unless indeed it were for the purpose of giving some colour to a transaction which required so much, and which, without, it would not bear investigation. Still if it were unnecessary, it would be nugatory in effect. If it were necessary that the plaintiff should join in the conveyance, in order to complete and perfect the defendant Court's title by such an act—then let us see under what circumstances and by what means it was brought about in this case. The trustees wrote to the plaintiff, circumstanced as he was, a letter, requiring him to come over for the purpose of signing the deed; and in that letter they threaten him, that if he do not, the annuity of 150*l.* will be withheld from him! Such a mode of proceeding—towards a man situated as the plaintiff at that time was—in such very distressed circumstances—living abroad, whither he had retired with his family, from a fear of his creditors, with nothing, most probably, but that annuity to subsist upon—must have had most assuredly the effect of placing him in complete and absolute duress. If therefore the conveyance by the plaintiff was not necessary, it can have no effect; and if it were necessary, it is rendered null and void by the circumstance of undoubted duress, under which it was executed. I therefore put the execution of that deed by the plaintiff altogether out of the question; for I cannot treat it as any thing like an effectual confirmation of the contract for sale of these premises, which had been so made by the trustees: and I am bound judicially to regard it as wholly nugatory, both against the defendant and the trustees.

[*169]

OLIVER
v.
COURT.
[*170]

Then the only substantial objection is the length of time which elapsed before any step was taken by the plaintiff. The bill was filed in 1815 : and *the transaction was certainly entirely concluded in February, 1803. Now even if this were a case of a claim of legal estate, the right would not have been barred at law by the Statute of Limitations ; but, if it had, a court of equity would not be precluded in such a case as this from affording the party relief. Although courts of equity, for the sake of convenience, have usually adopted on the principle of that statute, and as it were by analogy to it, a restrictive rule which has been found to be of considerable practical utility, as to a limitation of time for the commencement of suits, generally ; yet those Courts have always exercised a discretionary power of relaxing that rule wherever circumstances have required it, and it has been found not adapted to meet the justice of any particular case. Now surely this of all others is peculiarly such a case as demands a relaxation of that rule of practice. Having regard to the utterly impotent situation of the party during the whole of the intermediate time, how can he be considered to have lost his right to redress ? He continued to reside in the Isle of Man, where he had sought refuge, under the same insuperable embarrassments as had originally driven him there. I do not know the extent of his means whilst he remained there beyond the annuity of 150*l.*, or whether any of his debts had then been paid during his retreat ; but we find *that he was so circumstanced, during the whole time, as that he was not able to return to England till the year 1813 : and I would ask what lawyer in the kingdom will say, that—where a party has laboured under a fraud, practised upon him in 1802, when he was lying out of the kingdom in consequence of the embarrassed state of his affairs, which obliged him to remain abroad till 1813—he therefore loses all right to have justice dealt out to him by a court of equity on his return at that time, when he claims to be restored to his property of which he has been in the mean while deprived by the effect of that fraud ? I, for one, certainly think that he does not ; and that therefore there is not in the present case any sort of ground for maintaining that objection.

[*171]

I am clearly of opinion that the plaintiff has fully made out

his case; for there have been disclosed such facts in the course of this investigation, as, on principles of public policy, render it impossible that this transaction can be permitted to stand. And I will add, that the circumstances of this case afford ample ground for granting the relief which is prayed by the bill: for not only do they authorise the interference of the Court on behalf of the plaintiff; but they also plainly evince the wisdom of adopting in judicial proceedings those principles of public policy which have since been constantly recognized and acted upon by courts of equity in administering relief in all cases of this nature.

OLIVER
v.
COURT.

His Lordship then pronounced the following

[172]

DECREE.†

Declare the purchase by the defendant Court of the plaintiff Oliver's life interest in the estate and premises in the pleadings mentioned, to have been, under all the circumstances, improperly made by the defendant, and that it ought to be set aside—and decree the same accordingly.

Let the conveyance stand as a security to defendant Court for payment of what should be found to be due on the balance of the account directed.

Refer it to the Deputy Remembrancer to take an account of the purchase-money, and to compute interest and to take an account of the rents and profits received by the defendant Court, or (&c.)—to charge him with the amount of the fine or premium received from Stokes in respect of the lease; to set an occupation rent on the premises during the occupation by Court, and to make annual rests—what should be found to be due from Court to be paid in reduction of the purchase-money and interest—to make allowances for all material repairs and lasting improvements, and whatever part should not have been satisfied by the rents

† These are really the minutes. full, but some of the points in the Daniell's report, at p. 318, gives minutes are not accounted for.—what purports to be the decree in F. P.

OLIVER
v.
COURT
[*173]

*and profits, to be added to the purchase-money. Upon payment by the *plaintiff of what should be found to be due to defendant Court: to direct him to re-convey the premises to plaintiff, free from incumbrances, Waldron (the incumbrancer, who had been since satisfied) to join in the conveyance—to take an account of the timber felled, and how disposed of, and of all waste committed by Court or persons claiming under him, and to set a value thereon.*

The costs of the plaintiff to the hearing to be taxed, and paid to him by defendant Court—the costs of defendants Waldron and Stokes to be paid to them by the plaintiff in the first instance, and afterwards to be repaid by the defendant Court to him.

The bill to be dismissed as against Stokes :—and as between the plaintiff and defendants Hill and Rufford, (the trustees) the Lord Chief Baron does not think fit to give any costs on either side—the bill to be dismissed as against them—and the injunction to stay waste to be continued.

Reserve costs and further directions, with liberty to the parties to apply to the Court in the mean time.

EXCH. EASTER TERM.

THE KING *v.* WINSTANLEY.†

(8 Price, 180—189.)

1820.
May 3.THE KING
v.
WINSTANLEY
[180]

By the Acts of Parliament passed for building, improving, and maintaining the Liverpool Docks, the corporation (who are trustees for the purpose of carrying them into execution) are authorized to levy certain rates and duties on the ships and vessels entering and going out of the port of Liverpool: and they are empowered to borrow money not exceeding 600,000*l.* for the maintenance of the docks, by sale (by auction), of assignments of the rates and duties (for the form of which, see the case) so imposed on the shipping, securing to the purchasers 100*l.* each, with interest, till paid: Held, that the assignment was not a mere chattel but a charge upon the docks; and therefore an interest in land: and, consequently, that the auctioneer selling those assignments cannot be called upon by the Excise for the higher duty imposed by the 43 Geo. III. c. 69,† schedule A, and 45 Geo. III. c. 30,† on the sale thereof; because they are, as being an interest in land, liable only to the lower duty.

Trustees appointed by an Act of Parliament for the purposes of the Act are liable to duty on sales ordered by them in the execution of the trust.

This was a proceeding by *scire facias*, against the defendant, who was a licensed auctioneer, founded upon his bond (in the common form) to the Crown, for not having accounted for the duties alleged to be charged on certain sales by *auction of statutory securities issued by the trustees of the Liverpool Docks, under the Act of the 51 Geo. III. c. 143.

[*181.]

The cause came on to be tried before the Lord Chief Baron, at the sittings at Westminster, after Hilary Term, 1819, when it was agreed, that a verdict should be taken for the Crown, subject to the opinion of the Court, on a special case, which was in effect as follows:

Under various Acts of Parliament, passed from time to time,

† See note at end of case, p. 747, and *In re Christmas, Martin v. Lacon* (1806), 33 Ch. Div. 332, 55 L. J. Ch. 878.

† These Acts have been repealed. But the point whether the property here described is comprised in the

description "interest in land" or "other goods and chattels" in connexion with the words "fixtures, pictures, books, horses and carriages," may possibly be still of practical application.—R. C.

THE KING
v.
WINSTANLEY

previous to the 51 Geo. III., certain lands belonging to the Corporation of Liverpool were appointed, and other lands, tenements, and hereditaments, were purchased by, and vested in the said corporation, for the purpose of making, erecting, and maintaining, certain docks, basins, &c. for the accommodation of shipping in the port of Liverpool, to remain to, and for such uses for ever: and the corporation were thereby authorized to levy certain rates and duties upon ships and vessels coming into and going out of the port of Liverpool. By the 51 Geo. III. (An Act for the improvement of the port and town of Liverpool and amending the several Acts relating to the docks, &c.) after reciting the former Acts, it was enacted, that the corporation and their successors should, for the purpose of carrying all the said Acts into execution, as to all things relating to the docks, quays, basins, works, and buildings, erected or made under the said Acts, or which should be erected or made, be called and known by the name and style of the "Trustees of the Liverpool *Docks;" and by that name should have perpetual succession, and be incorporated, and have a common seal; that from and after the 24th day of June, there should be paid, and payable to the said trustees, and to their collector, &c. for every ship or vessel (ships in his Majesty's service excepted) coming into, or going out of the said port of Liverpool, by the master, or commander, or owner of every such ship or vessel, according to the tonnage burthen thereof, the several rates or duties of tonnage, therein-after particularly specified, according to the several and respective classes of voyages in the said Act described;—and before the vessel should be permitted to clear out at the Custom House of the said port or depart, that there should be payable to the trustees, upon all goods, wares, &c. imported from parts beyond the seas, or brought coastwise into the said port of Liverpool, or exported to parts beyond the seas from the said port of Liverpool, by the owner or owners, consignee or consignees, of such goods, wares, merchandizes, or other commodities, certain rates and duties—that the several collectors should not permit any vessel to be cleared outwards, unless and until the rates and duties, chargeable under the authority of the Act, should be fully paid, and the owner or owners, consignee or consignees, of such goods

[*182]

and merchandize, should have produced to the said collector of the customs a certificate thereof ;—and that if any master, &c. should, by any means whatsoever, elude or evade the payment of the rates and duties thereby made payable, to forfeit, besides such rates and duties, *a sum of money equal to the rates or duties so eluded or evaded. [*163]

THE KING
v.
WINSTANLEY

It was thereby also enacted, that it should be lawful for the trustees to borrow money (not exceeding 600,000*l.*) on the credit of the rates and duties, and to assign the said rates and duties to persons advancing money, as a security for any sum or sums of money so to be borrowed, with interest, by a form of assignment, the material part of which is in the following words: "By virtue, &c. we, the trustees, &c. do assign unto, &c. his executors, administrators, successors, or assigns, all and singular the rates and duties arising, granted, and made payable to us by virtue of the said Act, or of any other Act relative to the docks, in the port of Liverpool aforesaid; and also all the estate, right, title, and interest of us, of, in, and to the same, to hold unto, &c. (the lender), his executors, administrators, successors, and assigns, until" payment, with interest, after the rate, &c.: and such assignment was made transferable by indorsement in the way of memorandum. The Act provided, that the persons lending the money so raised, should be equally entitled to respective proportions of the rates and duties, according to the amount of their advances; and the assignments were directed to be put up at auction, the money borrowed to be laid out in building the docks.

The trustees of the docks, in pursuance of those Acts of Parliament, proceeded in the erection of new docks, and in the other improvements thereby *authorized: and they had raised money by the means therein given, for carrying into execution the purposes of the said Acts. [*184]

On the 3rd December, 1816, the defendant, being a licensed auctioneer, gave due notice of holding an auction sale at Liverpool, of assignments of the rates and duties of the said docks, to the amount of 20,000*l.*, in sums not less than 100*l.* each, by the "Trustees of the Liverpool Docks," to the Collector of Excise for Liverpool, in whose collection the said sale was intended to be

THE KING
v.
WINSTANLEY

made ; and in pursuance of such notice, afterwards, on the 6th of December, 1816, he did sell, at and by way of auction, a great many of the said assignments on behalf of the said trustees, such assignments being made by the said trustees, in the form prescribed by the Act of 51 Geo. III., towards raising the sum of 600,000*l.* therein mentioned, on the credit of the rates and duties, by the said Act authorised to be levied.

The defendant afterwards delivered to the collector a catalogue of the said assignments, therein particularly described, containing an account of the several prices at which the same were respectively sold, and the defendant then paid to the collector a sum, as an auction duty of 7*d.* in the 20*s.*, upon the amount of the assignments sold ; at the same time protesting, that no auction duty at all was payable upon the sale by auction of the said assignments,—and so of others sold subsequently.

[185]

The collector of excise afterwards demanded from the defendant payment of a further sum, as the residue of the duties by law due and payable by the defendant, for, and in respect of the purchase money arising and payable by virtue of the aforesaid sales, charging the duties payable on such sales, at 1*s.* on the 20*s.* of such purchase monies as aforesaid, in lieu of the sum of 7*d.* in the 20*s.*, of such purchase money, paid by the said defendant under and with such protests as aforesaid ; and that further rate, charge, and sum of money, the defendant refused to pay to the collector.

The questions for the opinion of the Court were : 1st. Whether any auction duty was payable by the defendant upon the sale by auction of the assignments. 2ndly. Whether the defendant ought to have accounted for the auction duty on the sales, after the higher or the lower rate of duty imposed upon sales by auction.

If the Court should be of opinion, that no duty was payable upon the said sales by auction, or that the lesser duty of 7*d.* only in the 20*s.* was payable thereupon, the verdict for the Crown was to be set aside, and a verdict entered for the defendant : but if the Court should be of opinion, that the higher duty of 1*s.* in the 20*s.* was payable upon the said sales by auction, the verdict for the Crown was to stand.

[After argument, in which *The King v. Bates* (3 Price, 359), was cited], the COURT decided, that some duty was clearly chargeable by the Act on the sale. But they held, that as on the authority of *The King v. Bates*,† the subject-matter of these assignments must be considered an interest in land, (assimilating them to port duties, which, they observed, would be an interest in land,) and as such securities on the rates and duties, imposed by the corporation for the erection and support of the docks, confer on the purchaser an interest in the soil, by whatever means such duties were directed to be raised, he must be taken to have acquired thereby an interest in land, within the meaning of the 43 Geo. III.

THE KING
v.
WINSTANLEY
[189]

They therefore ordered the verdict which had been found to be set aside, and that there be entered a

Verdict for the defendant.

† That was a case relating to the sale of bonds secured upon rates raised under special Acts for the paving of certain streets to be levied upon the occupiers of houses. The COURT held, on the authority of cases under the Statute of Mortmain, 9

Geo. II. c. 36 (*Knapp v. Williams* (1798) 4 R. R. 252 (4 Ves. 430, n.); *Finch v. Squire*, 7 R. R. 337 (10 Ves. 41)), that the bonds came within the description of "interests in land."—R. C.

EXCH. TRINITY TERM.

—♦—
ERROR FROM THE KING'S BENCH.

1820.

June 17.

Exchequer
Chamber.

[225]

HOME v. LORD F. C. BENTINCK†

(8 Price, 225—255; S. C. 2 Brod. & Bing. 130.)

In an action by one military officer (for libel) against another, who,—as President of a Court of Inquiry composed of military officers, held under the directions of the Commander in Chief of the Forces, for the purpose of investigating the doubtful conduct of the plaintiff, and to determine whether it were a fit subject for a court martial—delivered in person to the Commander in Chief, a transcript of the minutes of the proceedings, evidence, and judgment of the Court, in the form of an official report containing the alleged libellous matter; the Chief Justice of the King's Bench refused to permit the report, or a copy of it obtained from the office of the Commander in Chief, the regular place of deposit for such documents, to be given in evidence on the part of the plaintiff: Held, by the Court of Error, on argument of a bill of exceptions tendered against the exclusion of the evidence offered, that the evidence was rightly excluded; because the interests of the State require that such documents should be kept inviolably secret, and that their disclosure, by production as evidence in courts of law, should not be compellable by a party, or allowable by the Judge—because it is his duty judicially to exclude, as guardian of the public good, all matters that might tend to injure the general welfare.

Semble, military Courts of Inquiry, constituted and held as in this case, are not illegal, nor contrary to the provisions of the Mutiny Act.

THIS writ of error was brought on a judgment given for the defendant in an action against him for a libel in the publication of a document.

[226]

On the trial, before Abbott, Ch. J. at the sittings before Michaelmas, 1819, at Guildhall, the counsel for the plaintiff tendered an exception to the learned Judge's exclusion of certain evidence offered on the part of the plaintiff in support of his case. A bill of exceptions (having been sealed by the learned Judge) was now brought into the Court of Error, setting out the whole record, and

† Applied in *Dawkins v. Rokeby* (1873-75) L. R. 8 Q. B. 255, 268, L. R. 7 H. L. 744, and followed in *Hennessey v. Wright* (1888) 21 Q. B. D. 509, 57 L. J. Q. B. 530.—R. C.

the subject-matter of the evidence which his Lordship would not permit to be read.

HOME
v.
LORD
BENTINCK.

In the first count of the declaration it was alleged, that the plaintiff being a lieutenant-colonel in the army, and having a commission of captain, &c. &c. the defendant published a libel of and respecting said plaintiff. The last and most material count stated, that the defendant had been appointed, with six other persons, by His Royal Highness the Duke of York, Commander in Chief, &c. to enquire into the conduct of the plaintiff (in respect of certain charges imputed to him in matters relating to a mining adventure in which he had been engaged, supposed to be derogatory to him as a military officer), and that the defendant was appointed to preside at the deliberations of the said persons, and to report to His Royal Highness the opinion of the said persons, touching, &c. ; [the plaintiff's conduct in the mining adventure,] and that, although it was the duty of the said defendant to report truly the opinions of the said persons, yet the defendant well knowing, &c. but wrongfully and unjustly intending to injure *the said plaintiff in that behalf, and to deprive him of the countenance and good opinion of his said Royal Highness Frederick, Duke of York, did afterwards, to wit, &c. falsely, deceitfully, and injuriously, publish, suggest and represent to his said Royal Highness, that the said persons so appointed as aforesaid, had unanimously agreed in certain opinions there following, of and concerning the plaintiff, as such officer as aforesaid. [Then followed the statement in the report of the matters complained of, on which this action for the alleged libel was founded; but upon that no part of the present question depended.] The declaration concluded by denying that the said persons had unanimously agreed in the said opinion: and after the usual averment of general injury, averred, that by reason thereof, His Royal Highness George, &c. Regent, &c. acting, &c. did deprive the plaintiff of his rank of lieutenant-colonel in the service of His Majesty, and of his commission of captain in the 3rd Foot Guards, and the profits, &c. Plea, the general issue.

[*227]

In support of the plaintiff's case, Sir Henry Torrens was called as a witness and to produce certain minutes which were

HOME
v.
LORD
BENTINCK.

[*228]

stated to contain the subject-matter of the alleged libel. On his examination, he stated that he was military secretary of His Royal Highness the Duke of York : and, after having proved the military appointments which the plaintiff had enjoyed in the service of the King, he stated, in substance, that *he, as such military secretary, was in possession of the minutes of a Court of Inquiry, held by the direction of the Commander in Chief, of which the defendant was president—that the Court of Inquiry consisted of several other military officers as well as the defendant, and that the inquiry was directed by the Commander in Chief to be made by such Court upon the conduct of the said plaintiff—that the minutes so in possession of Sir Henry Torrens (the witness), were the proceedings, evidence, and judgment of the said Court of Inquiry, and were delivered by the defendant as President of the said Court, personally, to the Commander in Chief, as the report of the said Court upon that inquiry—and that those minutes were deposited in the office of the Commander in Chief, and the same, by being so deposited, became and were under the care, and in the custody of the witness, as military secretary.

[The counsel for the plaintiff then offered in evidence first the original report of the Court of Inquiry, and also a transcript of those minutes which had been obtained from the office of the Commander in Chief.]

[*229]

The bill of exceptions having stated thus much, then set forth that the counsel for the defendant insisted that the said minutes could not be admitted and allowed to be read in evidence, and that the counsel on the part of the plaintiff insisted that they ought—whereupon the CHIEF JUSTICE then and there declared *and delivered his opinion that the minutes ought *not* to be read in evidence : and thereupon the plaintiff's counsel offered and tendered a copy of the said minutes as evidence delivered from the office of His Royal Highness the Commander in Chief, which was also not allowed to be read—that afterwards at the trial, the jury, under the directions of the said CHIEF JUSTICE, found a verdict for the defendant : whereupon the counsel for the plaintiff

proposed the aforesaid exception: and that was now the material error assigned.

HOMER
v.
LORD
BENTINCK.

Evans, Joshua, for the plaintiff, submitted, in support of the exception, that the evidence ought to have been admitted; for that otherwise, however clearly libellous and actionable the matter of the report, as set out in the declaration, might be, the Court, by rejecting the evidence of the minutes of the proceedings of the Court of Inquiry forming their report, which had been tendered in evidence, would, by thus excluding the only proof which could be given in support of a case of this sort, altogether shut out the injured party from any remedy which he might otherwise have obtained by having recourse to law.

* * * * *

Littledale, in support of the judgment * * * cited a case [238]
of *Anderson v. Hamilton*† (Middlesex Sittings *after Trinity [*245]

† *ANDERSON v. Sir W. O.
HAMILTON, Knt.*†
(8 Price, 244, n.—247, n.; S. C.
2 Brod. & Bing. 156, n.)

Communications in official correspondence relating to matters of State, cannot be produced in evidence in an action by an individual against a person holding an office, for an injury charged to have been done in the exercise of the power given to him as such officer—not only because such communications are confidential, but because their disclosure might betray secrets of State policy, which might be injurious to the interests of the country.

Nor can an extract be admitted relating to the particular matter, because the whole must be read or none.

ON the trial of this cause (which

was an action against the Governor of Heligoland, for false imprisonment), the plaintiff's counsel called as a witness Henry Goulbourn, Esq. one of the under Secretaries of State for the Colonial Department, of whom questions were asked respecting a letter which had been addressed to the Earl of Liverpool (at the time of the transaction in question, Secretary of State for that department), complaining of the conduct of the defendant towards the plaintiff—and also, whether he had certain letters, and copies of letters, in Court, which were kept in the office, forming part of a correspondence between the Earl of Liverpool and the defendant, on the subject of the plaintiff's letter to his Lordship.

1816.
Feb. 23.
—
[244, n.]

The *Attorney-General* objected to all such letters being received in evidence: as to the first, on the ground [*245, n.]

† Lord ELLENBOROUGH's judgment in this case is referred to by Lord CHELMSFORD, delivering the judg-

ment of the Judicial Committee in *Stace v. Griffith* (1869) L. R. 2 P. C. 420, 426.—R. C.

HOME
v.
LORD
BENTINCK.

Term, 1816), in which Lord ELLENBOROUGH would not suffer a letter written to Lord *Liverpool (at that time Secretary of

[*246]

of its not having been shewn or stated to have been written with the knowledge of the defendant, and because it had been represented to contain a complaint on the part of the plaintiff against him, holding, as he then did, an office in one of the dependencies of the country, to the person representing that department of the Government at home which had power and authority over those dependencies: and that it would be too mischievous a course of proceeding to be permitted.

[*246, n.]

As to the other letters, he objected that it would be of dangerous consequence to permit plaintiffs in cases of this sort, to call for their production in evidence; because such production was unanswerably objectionable, on the ground of the defendant being no further a party to such correspondence than as a person representing his Majesty in the government of his dependencies abroad who had been called upon, as Governor, to make communications to the head of the department at home, of the most confidential nature, and which the policy of the State, and the interests of the country, made it necessary that they should not be, on any occasion of a personal complaint made by an individual against the Governor, and brought into a court of law, by means of an action, disclosed and made public in the manner proposed.

The plaintiff's counsel attempted to remove the first objection, by saying that they only required its production to lay the foundation for requiring the answer: and as to the second ground of objection, they stated that they did not require the whole of the correspondence, but

merely the answer to the plaintiff's letter of complaint.

LORD ELLENBOROUGH:

That is a much more objectionable document than the other; for that is an official letter, the other is a complaint against an individual. If objection had been made by the noble Earl to the production of this correspondence, as relating to a matter of State, I should have *given the fullest effect to it. I remember upon some of the State Trials, Lord Grenville was called upon to produce some letter which was supposed to have come to his hands, having been intercepted in the course of the post, or something of that kind—speaking from recollection, I know not whether I am quite correct as to the fact—but upon an objection being taken, it was considered that secrets of State were not to be so taken out of the hands of his Majesty's confidential servants. Now I am very unwilling to receive evidence of what Lord Liverpool may have written by way of observation on the subject of the plaintiff's complaint, for it might have the effect of a collateral condemnation of the party, independently of the facts of the case. If it was to be used merely to prove a fact, it would be a different matter.

It was then suggested, that the object of it was to prove a fact—the fact of the complaint to Lord Liverpool.

LORD ELLENBOROUGH:

I do not like the breaking in upon this correspondence. A letter which he himself may have written, there would perhaps be no objection to his communicating; but in this corre-

State for the Colonial Department), by an agent of the British *Government at one of the Colonies (Heligoland), to be produced in evidence, or Lord Liverpool's answer, his Lordship holding that all official letters were of a nature not to be allowed to be so made public, in consideration of their contents relating to matters of State. The same doctrine was held in the cases of *Hardy*,† and *Tooke*, and that is the result of all the cases which are collected in Phillipps's Treatise on the Law of Evidence.‡

He then submitted, that although there were cases where, when an original document could not be given in evidence, a copy might be put in; yet in this case, the objection, which applied to the production and reading of the original, and the reasons on which it was founded, applied with equal force to the production of the copy, and therefore, he contended, that both must be excluded.

Evans, in reply, urged, that the Sovereign has no greater power over the soldier than over the citizen, beyond what was conferred on him by the Mutiny Act; and therefore, as the direction, to *hold the Court of Inquiry for the purpose of canvassing the plaintiff's conduct, was illegal, it might have been

HOME
T.
LORD
BENTINCK.
[*247]

[*248]

spondence there might be a thousand things of the utmost consequence respecting the views of the Government, the connection of parties, the state of politics, and suspicions of foreign powers with whom we might be in alliance: and therefore if the fact you wish to establish can only be proved by giving in evidence part of what is embodied in an official letter, it cannot be got at at all.

The plaintiff's counsel then stated that their object was also to prove that Lord Liverpool had given orders for the release of the plaintiff, and that that order had reached the defendant, and that he had denied the order, and continued to keep the plaintiff in custody, all which a single extract would prove.

LORD ELLENBOROUGH:

That would open a different ground of complaint, which the declaration is not framed to include; for it does not state that the defendant imprisoned the plaintiff *at a particular time, and continued him in custody after an order had been given for his release. Then the reading an extract is objectionable; for the whole must be admitted or none: and I am of opinion that the whole is not admissible, on the ground of the objections which have been taken. It is also observable that the foundation of the order for his release is but the judgment of a third person, which, however high his rank, might be erroneous. On all these grounds I do not think the letters are admissible.

† 24 Howell's St. Tr. 753.

‡ Vol. i. pp. 284 to 288, 5th ed.

[*247, n.]

HOME
v.
LORD
BENTINCK.

disobeyed: at all events it could afford neither the members themselves nor their proceedings, any protection under pretence of privilege—that if a Court of Inquiry were analogous to a Grand Jury, its judgment could have no effect against the party whose conduct was before it, other than that of referring it to the efficient tribunal, a court martial; and on such a judgment, a dismissal from the service could not have been legally founded. A court martial followed the judgment of the Court of Inquiry in *Sir John Mordaunt's* case,† and he complained that that judgment operated to prejudice his case on the minds of the members of the court martial. He urged, to pursue the analogy between the case of military and ecclesiastical persons, that an Archbishop could not, on the unfavourable report of a Committee of Inquiry, illegally deprive a Churchman of his dignities or emoluments.

As to the argument founded on the State advantages of secrecy in its proceedings, he submitted, that that could not apply in this case; because the plaintiff had actually been served with a copy of the very report in question; and that copy the plaintiff had ready to produce at the trial, if it had not been excluded. [*249] He therefore contended, *that the judgment was erroneous, and could not be supported.

DALLAS, Ch. J. :

A great many topics have been discussed in the argument at the Bar, respecting matters which appear to us not to be immediately connected with the point before the Court. The only question now before us is, whether the minutes of the Court of Inquiry, which were offered in evidence on the trial of this action, were properly rejected: and that depends upon the nature of the proceeding. It therefore becomes necessary to examine what that proceeding was, and also the occasion on which it has been attempted to produce the minutes of it in evidence. The action was brought for a libel by the plaintiff, at one time a lieutenant-colonel in the army and a captain in the third regiment of Foot Guards, against the defendant, a major-general, and who, at the time of the transaction in

† M'Arthur on Courts Martial, vol. i. p. 212.

question, was a colonel in the army. In consequence of certain transactions, or a suspicion of such transactions, for I will use the latter mode of expression, supposed to be derogatory to the character of the plaintiff as a gentleman and an officer, His Royal Highness the Commander in Chief gave certain directions, such as are frequently given upon such occasions and which I think are of most beneficial effect; because, instead of being an exercise of a measure of severity, it is always so far from it, as to be on the contrary, an act of delicacy and mercy towards the party who is the subject of it. His Royal Highness directed *an enquiry to be made by a certain selection of officers, forming a Court for that purpose, into the facts upon which such suspicions were said to be founded, instead of bringing the plaintiff formally, in the first instance, before a court martial for trial, upon the mere charge or rumour. The proceeding was, therefore, in its very nature and object, an official proceeding; and it was authorized and directed by the Commander in Chief, for the purpose of obtaining that information, which he has a right and it is his duty to obtain, as to the doubtful conduct of every officer holding a commission in his Majesty's army, in furtherance of the exercise of his public duty, in deciding upon the result of such inquiry, whether the investigation was to cease in the first instance on a favourable result, or whether, if it were not favourable, the suspicion were of such a nature as to require recourse to any ulterior measure. The consequence of those directions was, that a Court of Inquiry was accordingly held, and the defendant in this action acted as the presiding officer of that Court; but he did so in consequence of a duty created and imposed upon him by the order of the Commander in Chief, which was imperative upon him. A report, which was the result of that enquiry, was in consequence made by the defendant, in conjunction and co-operation with the other officers, in the performance of that act of duty so cast upon him and them as military men, by the order of their superior officer, the Commander in Chief, whose orders they were bound to obey. We have heard very *much argument founded on what has been supposed to be the nature of Courts of Inquiry, their mode of proceeding, and their origin; but I cannot see the effect of that:

HOME
v.
LORD
BENTINCK

[*250]

[*251]

HOME
 v.
 LORD
 BENTINCK.

for—however constituted such Courts may now be; or whether they were first held in the year 1757, or before,—all such considerations are perfectly immaterial in my view of it, in determining the question in this case. We all well know to what a height of greatness and glory the armies of this country have risen, under the influence of the existing regulations. It is not to be denied, that from the earliest period up to the hour when this Court of Inquiry was held, the inconvenience attached to this mode of proceeding has been so little estimated, that no man has ever yet been deterred from entering into the British army on that account. It is quite impossible to refuse assent to the proposition, that as the present plaintiff, when he first became an officer in the army, must have known all the regulations of the service, he therefore, in point of fact, voluntarily, and of his own choice, subjected himself to these proceedings by means of a Court of Inquiry, to which, as to all other rules of military discipline, he must have known that he was, like all other officers, rendering himself amenable.

[*252]

The evidence attempted to be used upon the trial, was the written result of the enquiry made by the Court, and delivered by the defendant, as president, in the exercise of his military duty, to the Commander in Chief, and by him transferred *as an official document into the custody of Sir Henry Torrens, his military secretary. It was therefore created by and originated in a military order issued by a person holding a high and responsible office under the Crown: and the duty which produced it, was executed in consequence of that order. It was afterwards returned to that officer of the Crown, and deposited by him in that place, in which all official acts of such description are properly deposited. I will not enquire whether (even if it were admissible) Sir Henry Torrens could have been compelled to produce this report; for that is no part of the question now for our consideration: the question is, whether, even if he should have been willing to do so, it was not the bounden duty of the learned Judge before whom the cause was tried, on the sole consideration that this was a secret state document—and that not in virtue of any privilege on behalf of the parties immediately connected with it, but of the public, for whom the

HOME
 &
 LORD
 BENTINCK.

holder is a trustee—to have interposed and prevented the production of it with a view to being read publicly in evidence. Before I consider the few instances which have been alluded to as furnishing precedents applying to cases of this description, I will examine upon what ground and principle the objection in the particular case rests. It is agreed that there are a number of cases of documents of a certain description, in respect of which for reasons of State policy, the information that they contain is not permitted to be disclosed. In Courts of Justice, for reasons of public policy, persons—to instance one of the ordinary cases of *most frequent recurrence—are not to be asked the names of those from whom they receive information as to frauds committed on the revenue. In all the trials for high treason of late years, the same course has been adopted: and if parties were willing to disclose the sources of their information, they should not be suffered by the Judges to do so. The ground upon which these cases stand is, that such disclosures would be attended with danger to public justice; for no person would give information if his name might be disclosed in a court of justice, by which he would be subjected to the resentment of the party against whom he had informed. Does not this reasoning apply closely to the case now before us? This was an enquiry directed to be made by the Commander in Chief, with a view to investigate the conduct of, or some ground of suspicion respecting an individual, in the course of which, a number of persons may have been called before the Court to give information as witnesses, who might not choose to have their names disclosed; but if the minutes of such Court of Inquiry are to be produced on an action brought by the party, they might reveal the names of every witness examined, and the evidence given by each, and they might also reveal what had been said and done by each and every individual member of the Court of Inquiry. It is clear, therefore, that the admission of these minutes in evidence must tend directly to disclose what ought not to be permitted to be disclosed; and therefore, independently of the character and constitution and object of these Courts, I should *say, on the broad

[*253]

[*254]

HOME
C.
LORD
BENTINCK.

delicate enquiry, and the names of persons giving information, is in all cases to be prohibited.

The only case of those that have been referred to, which is more immediately in point, is that of *Wyatt v. Gore*, which was decided by the late GIBBS, Ch. J.† In that case the Attorney-General of the province was proposed to be examined as a witness upon the subject of communications made to him by the defendant, relative to Mr. Wyatt's conduct. *Lens*, Serjt. for the defendant, objected to that evidence; for that it would be highly improper for a public officer to disclose what passed between him and the Governor upon such an occasion, and that it was a confidential communication. The evidence was thereupon rejected. Now what was this report at present under consideration but a communication, in its very nature confidential, made in consequence of a direction by the Commander in Chief, for the information of his conscience, in the exercise of his public duty, whether he ought to suffer an officer to continue in the service or not? and that in the case of a soldier whom it must be admitted that, independently of any such enquiry, his Majesty, in the exercise of his prerogative, might have dismissed at any time. In giving his reasons for the validity of the objection *made in the case to which I have adverted, the CHIEF JUSTICE said, "The witness is not bound to answer, and in delicacy he will not answer such questions. Whether the conversations in which reference was made to Mr. Wyatt's conduct as surveyor-general, were on public or private business, they ought not to be disclosed. The Governor consults with a high legal officer on the state of his colony; what passes between them is confidential; no office of this kind could be executed with safety, if conversations between the Governor of a distant province and his Attorney-General who is the only person upon whom such Governor can lean for advice, were suffered to be disclosed." Now what was this proceeding but consulting with those who were bound to give the advice required, in the exercise of a public duty? and whether the case be that of the Attorney-General of a province advising the Governor, or of a member of a Court of Inquiry directed to be held by the Commander in Chief for his information and

[*255]

† *Wyatt v. Gore*, Holt, N. P. 299.

guidance; it is equally a case of advice and information given for the regulation of the conduct of a public officer. It seems, therefore, to us, upon the broad principles of State policy and public convenience, and also upon the principle of all the cases cited, that the Chief Justice of the Court of King's Bench acted perfectly right in not suffering these minutes to be brought forward at the trial: and that this judgment must be consequently affirmed.

HOMER
v.
LORD
BENTINCK.

Judgment affirmed.

THE KING (ON THE PROSECUTION OF GROVER AND POLLARD) *v.* GILES, ESQ., LATE SHERIFF OF THE COUNTY OF HERTS.

1820.
July 8.
[293]

(8 Price, 293.)

[THE question raised in the litigation of which this report represents an early stage came ultimately to the House of Lords, where it was finally decided in 1832. The decision of the House in the case under the name of *Giles v. Grover* is reported in 1 Clark & Fennelly, 72, and will be dealt with in the corresponding volume of the Revised Reports.]

FRERE *v.* MOORE AND WIFE, HEREFORD AND ANOTHER (REPRESENTATIVES OF COOKE), HUDSON, AND JANE FALLOWS (THE REPRESENTATIVE OF FALLOWS) AND BIRD.

1820.
July 8.
[475]

(8 Price, 475—491.)

A covenant by B. (who has the legal estate in property in which A. is a beneficiary) to stand seised for the purpose of securing a debt due by A. to C., does not give C. an equivalent to the legal estate, so as to give C. a priority over another creditor, D., who has an equity prior in date, and in other respects equal, to that of C.

The plaintiff, Thomas Frere, filed this bill against the several defendants, praying that the trusts of certain indentures, respectively of the 14th of August, 1813, and the 14th of February, 1817, might be performed and carried into execution:—that the

FRERE
v.
MOORE.

prebend and premises whereof such trusts were declared, might be sold:—and that an account might be taken of what was due to the representatives of Cooke, and to Hudson, and the representative of Fallowes, upon the security of the said prebend and premises.

[*476] The bill also prayed, that the respective priorities of the plaintiff and the last-named defendant might be ascertained, and particularly, that the plaintiff might be declared to be entitled to tack together the two several securities of the *14th May, 1813, and 14th February, 1817, and to be paid what was due to him upon both such securities, before and in preference to the defendant Hudson, and the representative of Fallowes, in respect of the securities holden by them, with the usual directions.

[The bill set forth certain deeds creating and dealing with a term of years in a certain prebend and real property. The deeds are obscurely and (as to dates) inaccurately † stated in the report, but their effect, according to the opinion of the LORD CHIEF BARON, appears to have been that, at the date of the next mentioned indenture, a term for certain lives in the premises was vested in one Bird in trust for securing 1,000*l.* to the assignees of one Cooke, and subject thereto for the benefit of Moore and wife, and A. Frere.]

[*477] By indenture of the 14th May, 1813, between Moore and wife of the first part, A. Frere *of the second part, and Bird of the third part; after reciting that a sum of 1,400*l.*, which had been formerly advanced, and that 1,500*l.* then to be advanced, to Moore by A. Frere, was to be secured upon the said moiety of the prebend and premises. Bird covenanted with Frere and Moore and his wife respectively, to stand possessed of the same, subject as to a moiety to Cooke's mortgage, first for securing to Frere the said sum of 2,900*l.* and interest, and subject thereto, and after payment of all costs and charges attending the execution of the trusts, in trust for such persons, &c. as Moore and his wife should appoint. Moore by that deed covenanted to pay to A. Frere the 2,900*l.* on the 14th of November then next.

The bill then stated, that A. Frere was since dead, and that the plaintiff was his legal personal representative—that at the

† See Sugden, V. & P. p. 739, 14th ed.—R. C.

FRERE
v.
MOORE.

time of the execution of the next mentioned indenture of the 14th of February, 1817, there was due to the plaintiff, as such representative, on the said security 2,714*l.* 16*s.* 6*d.*; and that afterwards, by indenture of the 14th of February, 1817, between Moore and his wife of the one part, and T. Frere the plaintiff of the other part, after reciting that such sum was due, and that there were also several other sums due to plaintiff, as executor of A. Frere, and of his sister, on promissory notes and bonds, given to A. Frere and to her, and also on bonds to himself long before the year 1816, amounting altogether to 2,162*l.* 15*s.*, Moore and *his wife appointed that Bird should stand possessed of the said prebend and premises, subject, as to a moiety, to Cooke's mortgage, for securing to him 4,877*l.* 11*s.* 6*d.*, and interest: and it was thereby covenanted, that if that money should be unpaid by the 14th of August then next, the plaintiff might enter and sell the premises.

[*478]

The answer of the defendants Hudson and Jane Fallowes, stated, that by indenture of the 30th of December, 1816, between Moore and his wife of the first part, Hudson and Fallowes of the second part, and Bird of the third part, Moore and his wife appointed, that from thenceforth Bird should stand possessed of the prebend and premises, subject, as to a moiety, to Cooke's mortgage for 1,000*l.*, and subject, as to the entirety, to the sum of † *l.*, with interest, due to the representatives of A. Frere, in trust for securing to Hudson 1,200*l.*; and, by endorsement thereon, Hudson declared that 200*l.*, part thereof, was the proper money of Fallowes, for whom his name was used as a trustee: and they submitted, that they had a prior charge on the premises for that amount.

A. Frere was not proved to have had notice of this mortgage when the mortgage of 1817 was executed to him.

On the hearing of the cause, a reference was ordered to the Deputy Remembrancer, the LORD CHIEF BARON observing, that the case raised a *very considerable question, and one of much novelty. The cause was now brought on for further directions.

[*479]

† Blank in the original report.

FRERE
v.
MOORE.

Martin and Wilbraham for the plaintiff contended, that he was in the situation of a party entitled to call for an assignment, and to get in the legal estate; for he was the first incumbrancer—that the lease to Bird, who was a trustee, was an outstanding instrument, to be considered as held for the protection of all the estates, according to their priority; and that the legal estate being in him, it was the same thing as if it were in the first incumbrancer, for whom he must be taken to be a trustee. They also submitted, that the plaintiff was entitled to tack the security of 1817 to that of 1818, as he had had no notice of the mesne incumbrance when he took that new mortgage; whereas, on the other hand, they submitted that the defendants had notice of the mortgage, which was recited in the very mortgage-deed to Hudson and Fallows, which cast upon them the duty of inquiring what was due to A. Frere before they advanced the mortgagor more money; and, more particularly, as there was no sum mentioned as the amount for which the mortgage was given, and a blank was left—that the defendants had been therefore remiss, and great laches was imputable to them, the consequence of which they must now abide. On the question of the priority claimed by the plaintiff as first incumbrancer, they cited the case *of *Ex parte Knott*,† where the LORD CHANCELLOR thus expresses himself in giving judgment on a similar question: “I shall not go through all the doctrine, which I examined with great jealousy in *Maundrell v. Maundrell*,‡ as that was the first case of the class that occurred while I have sat here, furnishing a great principle. I shall only observe now, that, when such a point as this comes to be discussed, if the legal estate has not been got in, it must be considered with reference to the question, whether the first incumbrancer has a better right to call for an assignment of the legal estate; and from that circumstance a Court of Equity is bound to hold, not only that the first mortgage shall be protected, as it was the first equitable security; but that mortgagee, having a better right to call for the assignment, is in equity in the same state as if he had it.’ In *Maundrell v. Maundrell*‡ also, where all the cases are brought

[*480]

† 8 R. R. 254, 259 (11 Ves. 609, 618).

‡ 7 R. R. 393 (7 Ves. 567, 10 Ves. 246).

together, the rule is laid down, that a subsequent incumbrancer cannot protect himself but by getting in the legal estate, or by obtaining an actual assignment of a term; and not then if there are circumstances in the case giving the prior incumbrancer a better right to call for an assignment. In this case, the term being outstanding in the trustee, there was no necessity for the prior incumbrancer taking an assignment from him, after his solemn covenant to stand seised to the use of the mortgagee—*Willoughby v. Willoughby*: † and enough had been done to put the plaintiff in a situation to maintain an ejectment.

FERRE
v.
MOORE.

[*481]

Jervis, Rose, and Pemberton, for the defendants, contended that the plaintiff was not entitled to any priority over the defendants Hudson and Fallows, in respect of the mortgage of 1817, or at least for any greater sum than 2,900*l.*, and that the plaintiff was not entitled to tack the subsequent to the preceding mortgage, so as to postpone the mesne incumbrancer—that the incumbrancers were, in all respects, save the date of their mortgages, on an equality—and that Bird was not a trustee for any one in preference to the others, except so far as they had prior claims in point of time, but was, in point of fact, a trustee for all.

They also insisted, that the subsequent mortgagees of the equity of redemption had an equal right to get in the legal estate; and, if they had done so, it would have given them a priority over the mesne mortgagees. That was so held in *Barnett v. Weston*.‡ The MASTER OF THE ROLLS there says, “The law of this Court gives a person who has obtained a mortgage of the equity of redemption this chance: that he may get in the legal estate if he can; and if he does get it in, the legal estate being united to his equity of redemption, he would have a priority over all the mesne mortgages.” In that case, too, the legal *estate was in the mortgagee in his own right; and a mortgage of the equity of redemption coming to him in the character of executor to a subsequent mortgagee, it was held, that the legal and equitable estate could not unite, so as to exclude mesne mortgagees.

[*482]

† 1 R. R. 397 (1 T. R. 763, 771).

‡ 8 R. R. 319 (12 Ves. 130).

FRERE
v.
MOORE.

On the objection of laches which had been imputed they submitted, that the laches were attributable to the mortgagee, who had not taken care to get the blank filled up.

The LORD CHIEF BARON observed, at the close of the argument, that this was a considerable question requiring deliberation; and that he had never before met with a case precisely similar in its circumstances. He therefore postponed giving judgment.

Adv. vult.

July 8.
—

The LORD CHIEF BARON now gave the following opinion on this case, for the purpose of disposing of the questions, subject to arrangement between the parties :

This case came before me nominally, as being a case for further directions. I shall, however, give no further directions.

[*483] The first instrument produced in evidence in this case was used by way of introduction, to shew where the legal estate was. By that deed, which is dated October 17th, 1786, a moiety of *the prebend is assigned to William Bird, to secure to Mr. Cooke a sum of money, afterwards reduced to 1,000*l*. There is no question at all between the parties as to that mortgage. That is clearly the first incumbrance on this estate. Thus, William Bird originally acquired the legal estate, which continued in him till his death, when his son Thomas Bird succeeded him. He took renewals of the lease from time to time.

The first deed which it is material to consider is dated October 12th, 1806. By that deed Thomas Bird, the son (who had then acquired the legal estate in the whole prebend) and Moore and his wife, assigned a moiety of the premises demised by the lease, to Anthony Frere, the brother of the present plaintiff, to secure 1,460*l*. By that transaction A. Frere obtained the legal estate, as to a moiety. Then I suppose we must presume that there was another intermediate assignment; for by the indenture of May 14th, 1813, which is the first instrument upon the effect of which this question is raised, it appears that the legal estate had, in the mean time, got back again into T. Bird, most probably on some renewal. In that indenture Bird covenants with A. Frere, and with Moore and his wife, to stand possessed of the

whole, to secure 2,900*l.* to A. Frere, subject as to a moiety to Cooke's mortgage, and subject thereto according to the joint appointment of Moore and his wife. The effect of that covenant is merely this: Moore and his wife being indebted to A. Frere in the sum of 2,900*l.*, and Bird having the legal estate of the whole prebend, *subject, as to a moiety, to Cooke's mortgage, they agree that Bird, who executed that instrument, shall stand possessed as a trustee for Frere, to secure the 2,900*l.* with such legal interest as should become due upon it. That is the only effect of that deed. He thereupon becomes a trustee for that purpose, and for that purpose only.

FRERE
v.
MOORE.

[*484]

Afterwards, December 30th, 1816, another deed is executed by Moore and his wife, and Frere, to which Bird is not an executing party. I need not state the formal parts of the deed; but the object of it referring to their power in the former deed of May, 1813, was to secure on this estate 1,200*l.* to Hudson and Fallows, who, in this case, insist by their counsel, that they stand next to Frere, after the payment to him of 2,900*l.* This deed is expressly an execution of the power reserved to them in the former deed. There was a blank left as to the amount of the sum intended to be secured by Frere's mortgage in the deed of 1813; but the security was stated, though the extent of it was not; so that, beyond all question, Hudson and Fallows had, at that time, distinct and full notice of the existing security to Frere. The consequence of that would be, that if they had afterwards obtained possession of the legal estate, they never could have made any use of it against Mr. Frere to the extent of his security. It has therefore been argued, and I think with good reason, that by this deed the parties had sufficient notice of Frere's prior security. It is, however, *also urged, that having such notice, they were guilty of laches in not making enquiry as to the real amount of the mortgage; more especially as in their own deed of December 30th, 1816, there was a blank left, and that blank might be for any sum, to any amount. I do not think that argument so well founded as that of the parties having had due notice; for it must be remembered, that if they had inquired of Frere what was the amount of his security—supposing they were bound to enquire, and to have ascertained

[*485]

FRERE
v.
MOORE.

the amount secured to him by the deed of 1813—they would have had no further information, than that 2,900*l.*, with interest to a certain period, was then due to him. Much was said of the deed being in the custody of Frere; but that was surely the proper custody, and their having had due notice of a security existing, which they certainly had, was equivalent to notice of every thing else. It was also said, it was the duty of Hudson and Fallowes to have given notice to Frere, that they were about to advance money on the security of this lease, which might have put him upon his guard against advancing more money, which he afterwards did. At the date of this deed of the 30th of December, 1816, however, there was due to Frere only 2,900*l.* and the interest. Beyond all question, Mr. Frere had become entitled to that sum, and the interest upon it, against any security that could afterwards be given to Hudson and Fallowes, or to any other person whatsoever.

[486]

Then, the deed of 1817 was executed in favour of Frere, and the further sum professed to be secured thereby it is, which Frere's representative seeks to tack—a strange term, by the way—or to unite to the security by the deed of 1813, and in addition to the former mortgage of 2,900*l.* and interest. That further sum is composed of several sums, making together 2,162*l.* Some of those sums were due to Frere the plaintiff, as the executor of his brother, and of his sister. 1,696*l.* was due to the plaintiff himself upon two bonds, and a small sum of 23*l.* was due to him on the balance of an account. At that time there was nothing that bears any thing like an appearance of a lien on the land. The highest security is a bond. Then the case stands thus. In the year 1813, Anthony Frere took a security for 2,900*l.* In 1816, Hudson and Fallowes took a security for 1,200*l.*; and, in 1817, the plaintiff took a further security for 2,162*l.*, in addition to that which was due to him as executor to his brother, on the former security, in the manner I have just stated.

Now the question is, whether the plaintiff is to tack together or unite his two securities, and by so doing postpone the middle security of 1816 to his own subsequent security of 1817. That is the main question in this cause.

FRERE
v.
MOORE.
[*487]

Neither of these parties has got in the legal estate ; and each of them, in my view of the case, has an equal equity. The defendants were all *honest incumbrancers, having money due to them. The plaintiff was also an honest mortgagee for 2,162*l.*, in addition to the former security of 2,900*l.*, and interest. Hudson and Fallows are also equally honest mortgagees, and no laches can be imputed to them, because, when they advanced their money, there was nothing more due to Anthony Frere than 2,900*l.*, with interest. I have never yet heard, that when a person is about to advance money on any security, that he is to give notice of it to another who has previously advanced money on the same property, requiring him not to advance more money, because he is also about to advance money to the owner of the same estate, yet that is the only notice which could be given by Hudson and Fallows to Frere. Were Hudson and Fallows bound when they were about to advance 1,200*l.* to Moore and his wife, to ask A. Frere, whether there was more money due to him ? And, because they did not, is Frere, or are his representatives, to consider whatever is due to them on an after security as if it were due on a prior security ? In my opinion, the subsequent mortgagees were not bound to tell the prior incumbrancer, that they, knowing that 2,900*l.* and interest was due to him, were about to advance the mortgagor more money ; and that really seems to be the only notice these mortgagees could have given to Frere.

All the parties, therefore, seem to have equal equities in point of honesty in the several transactions. *Neither of them has the legal estate ; and therefore they all stand on an equality in point of equity. The rule therefore must prevail *qui prior in tempore, potior est in jure* ; for as neither of these parties is possessed of the *tabula in naufragio*, neither has priority of right ; and therefore the priority in point of time must have the preference : consequently the security given in 1817 must be postponed to that of 1816.

[*488]

It was, however, contended for the plaintiff, that the covenant of Bird, to stand possessed of the legal estate for the plaintiff, is to be considered as tantamount to an assignment of the legal estate. That is certainly a point on which much stress was very

FRERE
v.
MOORE.

[*489]

fairly laid, and it is a question in the case which requires attention. By that covenant it is clear that Bird became a trustee for Frere; but Frere did not thereby acquire the legal estate. Then it was said that Hudson and Fallowes had notice that Bird was trustee for Frere, and were bound by it. They had notice, certainly, of a charge; but then it was only to the extent of 2,900*l.*, and interest. The legal estate, meanwhile, continued in Bird, and was not assigned to Frere. Then the question is, whether this covenant to stand possessed gave the same advantage to Frere as if he had had an assignment of the legal estate. There is no doubt that A. Frere had originally the first right, as between him and Bird; but what is the effect of that? I take it to be clear, that if I agree to purchase an estate, and take a contract or covenant, *that the owner will sell that estate, and he should sell or mortgage it to another person who has no notice, I, the first purchaser, cannot avail myself of any right to call on him for the legal estate; and, if the second purchaser can get in the legal estate, he may thereby protect himself. The person, therefore, who might have first called for the legal estate, unless he does so, has no advantage against another who gets in the legal estate, though his title be *posterior in tempore*. If there had been no covenant on the part of Bird, and Frere had come here, and filed a bill against Bird, and Moore and his wife, to compel them to perfect his security by a good legal conveyance, Frere would have been entitled to a conveyance; but he did not do so. If one has a right to obtain a conveyance of the legal estate, but do not avail himself of it, another may get the legal estate if he can. It is a well-known rule in courts of equity, where equities are equal, and they proceed invariably on that maxim, *qui prior in tempore, potior in jure*.

There is a very material difference in circumstances between the cases cited, and this now under consideration. Here the second incumbrancer had notice, it is true, that the legal estate was held in trust for Frere; but he had notice that it only amounted to 2,900*l.* If Frere had been the purchaser of the estate, it would have been conclusive, but as mortgagee, Frere has a prior equity to the amount of 2,900*l.*, and interest only; and he has no equity beyond that.

This case, therefore, is not like any that I have ever met with. I have looked with all the diligence I could (though, perhaps, it was not necessary), and I find no case at all in point, or which is applicable, distinguished as this is from the ordinary cases. There is, certainly, here a covenant to stand possessed of the legal estate; but then it is a covenant only for a given incumbrance, and to a limited extent. The case of *Maundrell v. Maundrell*, which has been cited,† certainly is a case which one cannot read without admiration and respect. Great talents and learning are displayed throughout, both by Sir WILLIAM GRANT and the LORD CHANCELLOR. That, however, is not a case which applies to this point. It was a case of dower. It is an anomalous judgment on a question of dower, as distinguished from a mesne incumbrance in respect of notice, and it decides simply this,—that if the legal estate, under a term anterior to the right of dower be outstanding, the purchaser will have the benefit of that term, if assigned, although he has notice of the right of dower.

The case *Ex parte Knott*,‡ we were also referred to, where there is a *dictum* of the LORD CHANCELLOR that was very properly much pressed; but he does not decide it. He says, “Before I could decide that question in bankruptcy—a jurisdiction in which there is no appeal—I must be satisfied that there was no danger of error.” He does not therefore decide it; he only throws it out, in the fulness of his learning, as a matter for consideration. *If the LORD CHANCELLOR had so determined, of course, I should be bound to pay great attention to his authority.

In this case, the legal estate outstanding must be held to be in trust for the benefit of the plaintiff, to the extent of one security; another person has advanced his money, on the security of the same estate, and then the first mortgagee advances more money on a subsequent mortgage. Both of them have equal equities, beyond all question; and neither of them has the legal estate; for the covenant to stand possessed, does not make any difference.

Under these circumstances, my opinion is, that the legal estate should be divided according to the priority of the securities in point of time. First, Mr. Cooke must have his 1,000*l.*; then Mr. Frere 2,900*l.*, with interest; next Hudson and Fallowes

FRERE
v.
MOORE.
[490]

[*491]

† 7 R. B. 393 (10 Ves. 246).

‡ 8 R. B. 254 (11 Ves. 609).

FRERE
v.
MOORE.

must be paid their 1,200*l.*; and then Mr. Frere comes next for the residue of what is owing to him, and secured by the last mortgage.

The case of *Barnett v. Weston* was cited. That was a decision of the MASTER OF THE ROLLS, and was, probably, well decided; but, as that was a case of very different circumstances, I do not think myself called on to enter into any disquisition on it.

EXCH. MICHAELMAS TERM.

1820.
[518]

SWAN v. SWAN.

(8 Price, 518—522.)

Where it is stated by the answer to a bill filed for a partition, that the defendant has laid out money in building and improving the premises, the Court will not decree a partition, without a reference to the Master to take an account.

Money laid out in improving the premises, does not, however, in strictness, create a lien on the premises, but it is a sufficient ground for a Court of Equity to refuse to interfere.†

1819.
Jan. 8.

THE plaintiff in this case filed a bill against the defendant for a partition of certain leasehold premises, to which the plaintiff and defendant were entitled in undivided moieties.

The defendant, in his answer, stated that the premises (subject to a mortgage to a third person) had been for several years in his possession as the farmer and occupier thereof, and that, during his occupation, he had laid out considerable sums (as therein specified) in buildings, and other improvements, and claimed a lien to be paid a moiety of the amount before partition should be made, or that it should be allowed to him in the measure of his allotment.

1820.
Jan. 27.
[519]

The cause was heard this day. The case of the plaintiff was supported by

Fonblanque and Meggison:

They urged that a decree for a partition was now considered

† See the limitation applied by FRY, J. to the doctrine of this decision, in *Re Leslie: Leslie v. French* (1883) 23 Ch. D. 552, 555. The case

is also cited by North, J., *Sinclair v. James*, '94, 3 Ch. 554, 556, 8 R. 637, 63 L. J. Ch. 873.—R. C.

almost of course, and that the defendant could not set up the lien insisted on by his answer as a bar to the prayer of such a bill.

SWAN
v.
SWAN.

Matthews, for the defendant, contended that the mortgagee should have been before the Court, as she was a party interested—and that a court of equity would not compel a partition where any of the parties had such a claim as was set up by the defendant, without securing to him a satisfaction of it: otherwise would leave the party to his remedy at law.

Per CURIAM:

The Court cannot make a mortgagee agree to a partition, because he is entitled to the whole. Although, in point of law, the defendant may not, strictly speaking, have any lien on the premises, yet if he has been at expense in improving them, as stated, beneficially for the plaintiff, the plaintiff has clearly no right to take advantage of that expenditure, without making any allowance; and therefore the Court will not interfere but on such terms, although there is no doubt that a court of equity may interfere in cases where a writ of partition would not lie at common law.

The Court, therefore, ordered a reference to *the Deputy Remembrancer to take an account of what had been expended necessarily or with the concurrence of the plaintiff.

[*520]

* * * *

SUTCLIFFE AND OTHERS v. GREENWOOD.

(8 Price, 535—538.)

1820.

Nov. 22.

[535]

A plea to an action of trespass for breaking plaintiff's close, that over and across, &c. was a common and public highway, for, &c. to pass along at pleasure, paying a certain toll, is not inconsistent or contradictory, particularly if not said to be immemorial, for it may be a highway created by Act of Parliament.

THIS was an action of trespass, for breaking and entering the close of the plaintiffs, "to wit, a certain close, being a private

SUTOLIFFE road," situate, &c. and breaking down and destroying a certain gate, then standing and being in the same close. The defendant pleaded, first, the general issue. Second, That over and across the *locus in quo* was a certain common and public highway for all the liege subjects to pass along at pleasure; that the gate obstructed a free passage, wherefore the defendant prostrated it. Third, That over and across the *locus in quo* was a certain common and public highway for all the liege subjects to pass along at pleasure, paying a certain toll in that behalf, at a certain toll-house erected near to and on the said road; that defendant, having tendered the toll therefore payable, passed along the said road; and, because the said gate obstructed a free passage, and because the gate-keeper refused to open it notwithstanding the said toll was tendered to him, defendant prostrated it, and so committed the supposed trespasses complained of.

Replication joined issue on the first plea; as to the second plea, the plaintiffs denied the right of road; and, as to the third plea, denied the tender: and issues were joined thereon.

[*536]

The cause was tried at the last assizes for the *county palatine of Lancaster, and a verdict was entered for the plaintiffs on the first and second issues, and for the defendant on the third and last.

Alexander (with whom was *Scarlett*) obtained a rule to shew cause why judgment should not be entered for the plaintiffs in this cause on the first and second issues, notwithstanding the verdict for the defendant on the last issue, on the ground that the justification therein pleaded was insufficient in law, being inconsistent and contradictory in terms, as that could not be a common public highway, passable at pleasure, for proceeding along which the passenger was bound to pay a certain toll.

Alderson now shewed cause :

He submitted, that, as the point put in issue was a subject-matter of proof, and as it would have been a variance if not proved as laid, it was necessary to state it according to the fact.

He cited *Bolt v. Stennett*,† where a plea, by way of justification to an action of trespass, that the quay was a public, open, and lawful quay, for landing, &c. for a reasonable compensation to be paid to the owner: *Aspidall v. Brown*.‡

SUTCLIFFE
v.
GREENWOOD.

In this case the defendant only justifies against the owner of the soil.

The Court called upon *Alexander* to support his rule:

The question is certainly merely technical. It is whether the allegation in the last plea, of the road in question being “a common and public highway,” and yet that passengers are liable to toll, be not repugnant in itself, and, consequently, the plea bad? [537]

It is an established maxim in pleading, that every thing shall be taken most strongly against the person by whom it is alleged: In other words, that, if the meaning of the expressions used be equivocal, they shall be construed most strongly against the party pleading them; for it is to be intended, that every one states his own case as favourably as possible. Now, every definition of “a common and public highway” that is to be found in the books, contains, as a material ingredient, the quality of its being common to all persons: by which must be understood the free and unrestrained right of using it at all times, without being subject to any pecuniary or other imposition. It seems, therefore, to follow as a necessary consequence, that where a right of passage can only be enjoyed upon payment of toll, the road does not come within the strict and legal sense of the words “a common and public highway.” The defendant, therefore, has justified under a right, which, in the eye of the law, has no existence, and his last plea, setting forth such a justification, is repugnant in itself, and no judgment can be pronounced upon it. The plaintiff is therefore entitled to enter up judgment on the first and second issues, notwithstanding the verdict for the defendant on the last.

By the COURT: The third plea is good, and the rule must be discharged. [538]

† 5 R. R. 486 (8 T. R. 606).

Saunders, *Rex v. Stoughton*, 158,

‡ 3 T. R. 265, and cited in 2 Wms. note 4.

SUTCLIFFE Wood, B.:

^{F.}
GREENWOOD.

The description is perfectly consistent with the road being a turnpike-road; particularly where it is not alleged, as here it is not, to have been a public highway from time immemorial. It may be a highway created by Act of Parliament.

Rule discharged.

ERROR FROM THE KING'S BENCH.

DAVIDSON AND OTHERS *v.* CASE.

(8 Price, 542—561; 2 Brod. & Bing. 379.)

1820.

Nov. 27.

*Eschequer
Chamber.*

[542]

[THIS report will be found with the report of *Case v. Davidson* in K. B., in 17 R. R. at pp. 280, 289.]

IAKEMAN *v.* M^eADAM.

(8 Price, 576—582.)

1820.

Nov. 18.

[576]

An extent at the suit of the Crown against the debtor of its debtor has not, before inquisition taken, the effect of divesting the Crown debtor's right to sue his debtor, or to receive the debt.

THE plaintiff had obtained a verdict against the defendant at the last Assizes for the county of Lancaster, for 300*l.*, in an action for money had and received.

[*577] The cause was tried before Parke, J. and the objections now made were taken at the *trial, but were overruled, with leave to move for a nonsuit.

Littledale, in the early part of this Term, obtained a rule to shew cause why that verdict should not be set aside, and a nonsuit entered, on the following facts: The action was commenced on the 9th of December, 1816, when the defendant was arrested at the plaintiff's suit, on process returnable on the first of Hilary Term. By an inquisition taken under an extent against Bruce & Co., one Ikin was found indebted to them; and, by an inquisition taken on the extent which issued thereupon against

him, on the 25th of September, 1816, the plaintiff was found to be indebted to him, and an extent issued against the plaintiff on the same day. By an inquisition taken on that extent on the 23rd of January, 1817, the defendant was found to be indebted to the plaintiff in the sum of 300*l.* for so much money had and received to his use, and that debt was seised into the King's hands. On the 25th of April, 1820, a rule, obtained by the plaintiff for an *amoveas manus*, was made absolute, on an affidavit filed the 11th of February, 1820, stating that the debt found to be due from him (Lakeman) to Ikin, was due from him as the acceptor of a bill of exchange, which had been since paid by the drawer, and that the assignees of the plaintiff, who had at that time become a bankrupt, under a commission dated the 2nd of August, 1817, and his estate assigned 20th Sept. following, were then proceeding in this action, in his name, against the *defendant; and the Sheriff of Lancashire returned that he had restored the possession of the said debt to the plaintiff.

LAKEMAN
v.
McADAM.

[*578]

On these facts it was submitted that the debt belonged to the Crown when the action was brought—that the *amoveas manus* should have been applied for by the assignees of the plaintiff, as the debt ought to have been restored to his assignees—and that the plaintiff ought to have discontinued after the *amoveas manus* had been obtained, if by that proceeding the debt was restored to the plaintiff; and he should have brought a new action, because, when the present action was commenced, he had a right to sue.

Tindal now shewed cause:†

Nov. 23.

He contended, that the extent had not the effect of divesting the right of the plaintiff to sue for the debt due to him from the defendant, and that it did not vest in the Crown from the *teste* of the extent, nor until after it had been found by inquisition; and, in this case, that was subsequent to the commencement of the action. The inquisition is in its nature an inquest of office, founded on the old legal notion of assigning debts to the Crown, which, in modern times, has given way to seizure under the

† The objection that the *amoveas manus* should have been applied for in the name of the assignees, was given up.

LAKEMAN
 v.
 M^cADAM.
 [*579]

inquisition—Gilbert's Treatise on The Exchequer, p. 167. He admitted, that although the debt might be bound, for many purposes, from the *teste* of the extent, it is not transferred *or assigned to the Crown till the day of taking the inquisition ; and even then the creditor's right is only suspended, but not extinguished.

He also submitted, that if there were any thing in the objection it ought to have been pleaded in bar of the further maintenance of the action, as was done in the case of a plaintiff becoming alien enemy after action brought, because it is in the nature of a plea *puis darrein continuance*—*Le Bret v. Papillon*,† and thus, one technical objection would be answered by another.

If, however, notwithstanding what had been urged, the Court should be of opinion that the right to sue was taken out of the plaintiff, the *amoveas manus* must be considered to have restored him to his original right of action ; for the effect of that was to re-vest that right, if it had ever been divested. But that it had not was clear from the effect of the *amoveas manus*, which alone operated to remove the plaintiff's liability without requiring any re-assignment of the debt, and, had it been transferred, that would have been absolutely necessary. After that proceeding, therefore, the parties were placed again in the same situation as if no extent had been issued.

[*580] He ultimately adverted to the statute of the 57th of Geo. III. c. 117, s. 8, which, he submitted, had provided that the rights of creditors should not be prejudiced by the seizure of debts *into the hands of the Crown, reserving to parties all their remedies as if the Crown process had never interfered.

Littledale, in support of the rule, submitted that it was not necessary in an extent to have an inquisition in order to vest the debt in the Crown. The object of the inquisition is to find the debt merely, and, when found, it is bound, by relation, from the *teste* of the extent, which is the award of execution, and, in respect of chattels personal, binds them, into whatsoever hands they shall afterwards come—*Vin. Abr. Prerog. of the King*, (D.) pl. 4. Debts are personal chattels—2 *Roll. Abr.* 157 ; and

† 7 R. R. 618 (4 East, 502).

are bound from the *teste* of the extent. *The Queen v. Arnold.*† If so, the seizure could not be pleaded as matter *puis darrein continuance*.

LAKEMAN
v.
M^cADAM.

As to the *amoveas manus* having restored the parties to their original situation, he contended that it had not that effect in this instance at least, because it had not issued till after the cause was at issue; and the defendant having in the mean time become bankrupt, the debt was restored to his assignees, and not to him, and it vested in them. If the defendant had pleaded the extent, the plaintiff could not have replied the *amoveas manus*, because it was not then in existence: or if he had applied to withdraw his replication for the purpose of replying the new matter, that would have been liable to the objection *that it was a replication by a plaintiff of matter *puis darrein continuance*, which would have been bad, because the use and object of pleas *puis darrein continuance* is to stop the plaintiff from proceeding further, and not to enable him to go on. His only course, therefore, would have been to have discontinued, and brought a fresh action. He should have began *de novo*, and that is what he may still do; so that he is not without remedy if he proceed in the proper manner.

[*581]

The Court intimated at the close of the argument that they considered this to be a question which required much attention, and therefore they deferred their decision.

Adv. vult.

The Court this day discharged the rule. They did not state any reasons for so determining. From what fell from the Court in the course of the argument, however, they appeared to consider that the extent did not operate to divest the right of the Crown-debtor, or so to transfer the debts due to him as to disable him from suing his debtors to recover his debts: and that if they were paid *bonâ fide*, without collusion, between the *teste* of the extent and the day of taking the inquisition, such payments would be good as against the Crown. They observed that the extent and inquisition operated rather to give the Crown a lien

† 7 Vin. Abr. 104.

LAKEMAN
v.
M^cADAM.
[*582]

on the debts due to its debtor than to divest the debt, or deprive *him of his right to sue, being analogous in effect, when perfected by the taking of an inquisition, with the old writ of protection, by which the debts due to Crown debtors were secured to satisfy the Crown.

1820.
Nov. 28.
[587]

THE KING v. JOHN VILLERS.†

[IN A MATTER OF STAMPS—ON SEVERAL WRITS OF IMMEDIATE EXTENT.]

(8 Price, 587—603 ; S. C. 11 Price, 576 ; Wightwick, 95.)

Sheriffs are not entitled to poundage on money seized in the Crown debtor's possession, under an extent against him :

Nor on money paid by the sureties of a Crown debtor who has been arrested on the Crown process, in order to obtain the release of his person.

Sheriffs have no authority under the extent, as sheriffs, to collect debts due to the Crown debtor ; and if they receive such debts, they cannot make it the ground of a charge for poundage on the amount.

THE subject-matter of this case was the amount of a claim of poundage, and for extra expenses set up by the Sheriffs of Coventry, on a levy made and money received by them under certain writs of extent, issued against the defendant, a distributor of stamps, for a debt due to the Crown.

The defendant J. Villers had been for many years, previous to the year 1806, distributor of stamps for the county of Warwick and city of Coventry. In the month of April in that year these extents were issued against him, for an alleged debt of 29,000*l.*, and upwards. The real balance found due to the Crown, on a return of stamps, was 13,671*l.* 5*s.* 5*d.* The levies were made *under the circumstances stated below in the report of the Deputy Remembrancer, to whom, after many applications to the Court on the several claims, it was ultimately referred, to take an account of the debt due to the Crown at the time of issuing the extents, and of all the money levied and raised under them, and its application, and to take an account of the sum of 5,000*l.* deposited with the Receiver General of Stamps by William Villers

[*588]

† The Act of Geo. I. referred to in the arguments of this case is repealed by the Sheriffs Act, 1887, but the enactment of the new Act, 50 & 51 Vict. c. 55, s. 20, does not appear essentially different.—R. C.

and William Belcher, the defendant's sureties, on account of the debt due to the Crown, and of the interest and accumulations, and the application thereof. And the Deputy Remembrancer was further ordered to state to the Court the different dates of the receipts and payments of the Sheriffs of Coventry, as well under the process against the defendant as under other writs of extent and *venditioni exponas* issued against other persons implicated in those proceedings, and to ascertain the Sheriff's poundage on executing the said writs of extent, or any process under the same.

THE KING
v.
VILLERS.

The Deputy Remembrancer, accordingly, by his report (dated the 8th of July, 1820) found that there was due to the Crown from the defendant the sum of 13,800*l.* 8*s.* 8*d.*, and that the whole of that debt had been paid in the manner mentioned in the first schedule annexed to his report.

That the Sheriffs of Coventry had, under the writs of extent, taken the body of the defendant, and kept him in custody, and had seized various *freehold and leasehold estates, notes, bills, monies numbered, and other property belonging to the defendant of considerable value; and that they had also returned upon the inquisition debts due to the defendant to a large amount.

[*589]

He also found, that upon the arrest of the defendant and seizure of his property, the defendant's sureties, W. Villers and Belcher, applied to the Commissioners of Stamps to obtain the defendant's discharge out of custody, to which the Commissioners consented, on the sureties depositing with them a sum of 5,000*l.* of their own monies, to be laid out in Exchequer bills, to indemnify the Crown against any deficiency, according to the terms and conditions of a written agreement, the substance of which was—that that sum should be deposited to secure to the Crown any deficiency that should appear on the sale of the defendant's effects, to satisfy the Crown's debt out of the produce—the 5,000*l.* to be laid out in Exchequer bills—and at the expiration of twelve months from the date of the *venditioni exponas*, or before, as soon as the defendant's effects should be converted into money, the 5,000*l.*, or a sufficient part thereof, to be applied to supply the deficiency, and pay what should be then found remaining due to

THE KING
*
VILLERS.

the Crown on the said debt, the surplus to be returned to the sureties.

[*590] That the 5,000*l.* was accordingly paid on the 2nd of May, 1806, into the hands of the Receiver *General of Stamps, in Exchequer bills, and the defendant was the next day discharged out of custody by *supersedeas*.

[*591] He further found, that the Sheriffs of Coventry, before they had made any return to the writs of extent, and without process, or any authority from the Court of Exchequer, but in conformity with a letter † addressed to the Undersheriff by Edward Estcourt, Esq. the then solicitor for the Stamp Duties, dated the 18th of April, 1806, applied to various debtors of the defendant, residing in the counties of Warwick, Somerset, Northampton, Worcester, Stafford, and elsewhere, out of the jurisdiction of the Sheriff of Coventry, and received debts due to the defendant from such debtors to the amount of 2,700*l.*; and that they had obtained payment of other debts due to the defendant from persons residing within their *bailiwick to the amount of 2,000*l.* and upwards, in the whole 4,830*l.* 11*s.* 7½*d.*

That, under the writ of *venditioni exponas* afterwards issued, the Sheriffs had levied, previous to December, 1808, 9,604*l.* 3*s.* 7½*d.*; and that they had, out of that sum, paid and applied, in part satisfaction of the said extents, and had retained for their extra costs and expenses in the execution thereof, as allowed pursuant to an award made in this cause on the 10th of July, 1818, and for their poundage, the sums mentioned in the third schedule to the report, amounting in all to the sum of 8,814*l.* 2*s.* 4*d.*,

† That letter was in the following terms, stating the extent of the power given by the Solicitor of the Stamp Duties, and his authority for so doing. It is transcribed here because it will be found to have produced some animadversion from the Court:—

“I have received your letter of the 17th instant, and I have communicated the contents to the Commissioners of this revenue, who desire me to inform you, that they see no objection whatsoever for your re-

ceiving any of the debts due to Mr. Villers, when the balance is clear and not disputed by him, but not otherwise, previous to your taking the inquisition; and you will of course state in your return to the writ the several sums so received. If you should find it necessary to have further time, there seems no objection to enlarging the return of the writ for a short period; and, in that case, you will have the goodness to send the writs to me for that purpose.”

which, deducted from the said sum of 9,604*l.* 3*s.* 7*d.*, left a balance in the Sheriff's hands, in respect of the monies so received by them, of 1,290*l.* 1*s.* 3*d.*

He also found, that the said sum of 5,000*l.* had been deposited with the Receiver General in Exchequer bills, which were renewed from time to time as former bills were paid off.

That the accumulations accruing thereon by interest, amounted, on the 8th day of August, 1810, to 1,070*l.* 19*s.* 9*d.*, making together 6,070*l.* 19*s.* 9*d.*; and that, on the same day, the Commissioners returned to the sureties 4,000*l.* in Exchequer bills, leaving in the hands of the Receiver General 2,070*l.* 12*s.* 9*d.*, which, by accumulation, amounted on the 5th of March, 1813, to the sum of 2,315*l.* 13*s.* 3*d.*, part of which (2,128*l.* 1*s.* 8*d.*) the Commissioners on that day appropriated, being the amount of the balance *due to the Crown; and that the remainder, with subsequent accumulations to the 23rd of September, 1818, left on that day in the hands of the Receiver General 228*l.* 17*s.* 6*d.*

He finally found, that he had taxed the costs of the Crown, amounting to 1,868*l.* 5*s.* 6*d.*, at 519*l.* 0*s.* 4*d.*—that he found the poundage of the Sheriffs, on executing the said writs of extent, and all process thereon, amounted in the whole to 209*l.* 7*s.* 10*d.*, and which had been retained by them out of the 9,604*l.* 3*s.* 7*d.* received by them, as stated in the third schedule, in which schedule he had distinguished in respect of what particular sums he had allowed such poundage.

The three schedules referred to were annexed to the report.

The first contained an account of monies paid in satisfaction of the debt due to the Crown, and was as follows:—

	£	s.	d.
Paid by W. Villers, the Receiver appointed by the Court, to the Receiver General of Stamp Duties	2,765	1	4
Paid by the Deputy Remembrancer, pursuant to orders in the cause, the produce of freehold property sold under the extents	589	5	7
Poundage and other allowances to defendant by the Commissioners on his debt	618	0	1
Paid to the Receiver General by the Sheriffs	7,700	0	0
Paid by the Receiver General out of the produce of the Exchequer bills mentioned in the Report	2,128	1	8
	<u>£13,800</u>	<u>8</u>	<u>8</u>

THE KING
V. VILLERS.

[*592]

THE KING
V. VILLERS.
[593]

The second schedule contained an account of the sums received by the Sheriffs under the writs of extent, as stated in the report, amounting to 9,604*l.* 3*s.* 7½*d.*, on some of which poundage had been allowed as in schedule 3, and on others not as in the exceptions.

The third schedule contained the account of the several sums paid and applied by the Sheriffs out of the 9,604*l.* 3*s.* 7½*d.* received by them, distinguishing the particular sums in respect whereof they had retained and been allowed poundage, as follows :—

	£	s.	d.
Paid Receiver General of Stamps by various drafts, amounting together to	7,700	0	0
Retained by the Sheriffs for extra costs and expenses, as awarded to them pursuant to order of 24th of April, 1818 . .	404	14	6
Poundage on the following sums, at 1 <i>s.</i> 6 <i>d.</i> in the pound for the first 100 <i>l.</i> , and 1 <i>s.</i> for the residue :—			
	£	s.	d.
On amount of produce of sale of household furniture and other like effects	1,137	15	6½
On amount of sale of wines, &c. in trade	1,713	11	10½
From sale of leasehold at Keresley	215	0	0
The like of a field	2	2	0
— of a close	12	12	0
— of stamp office	14	14	0
— of vaults	80	0	0
— of coach house and stable	16	0	0
— contingent interest of Mr. Villers, under Mr. Belcher's will	350	0	0
*From sale of the Wyrly and Essington canal shares	276	0	0
— Grand Junction canal shares	118	3	0
— Union canal shares	72	1	0
— Crinan canal shares	11	0	0
Amount of goods and effects of Joseph and Enelisha West, sold under writ of extent . .	118	18	6
	£4,137	17	11
		209	7 10
		<u>£8,314</u>	<u>2 4</u>

Sums received
on which the
Sheriff held
to be entitled
to poundage.
[*594]

To that report the Sheriffs of Coventry filed the following exceptions :—

For that the Deputy Remembrancer had allowed to the said Sheriffs the sum of 209*l.* 7*s.* 10*d.* for poundage only on the several sums hereinafter mentioned, viz. &c. (stating the par-

ticulars and sums as set forth above, in that part of the third schedule which distinguishes the sums on which poundage was allowed) amounting to the sum of 4,187*l.* 17*s.* 11*d.*

THE KING
v.
VILLERS.

Whereas the said late Sheriffs claim to be also entitled to poundage on the several sums hereinafter mentioned :—viz.

	£	s.	d.	
1st.—On monies found, seized, and extended in the hands and possession of the defendant, under the said writs of extent, and received, paid, and accounted for by the said late Sheriffs, amounting to the sum of	250	5	4½	
2nd.—On the amount of notes and bills found in the hands and possession of the defendant, and extended and received by the said late Sheriffs, and accounted for under the said writs of extent	281	0	9	[595]
3rd.—On the amount of the produce of two notes in the hands of the defendant, seized under the extent, and received by the said Sheriffs in part satisfaction of debts, before the return of the said writs of extent, and accounted for by the said Sheriffs under the said writs of extent	50	1	1	
4th.—On the amount of debts extended and received by the said late Sheriffs, and accounted for and paid under the said writs of extent	4,807	7	3½	Sums produced by means, held not to give the Sheriff a right to poundage.
5th.—On the amount of rents extended and received by the Sheriffs, and accounted for and paid under the said writs of extent	22	4	9	
6th.—On the amount of 5,000 <i>l.</i> paid by William Villers and William Belcher, the sureties of the defendant, in order to obtain the liberation of his person from the custody of the said Sheriffs, under the said writs of extent	5,000	0	0	
7th.—On the amount of monies received by the Sheriffs of Thomas Sharpe, for stamps on certain hat linings, and paid and accounted for under the said writs of extent	18	4	6	
8th.—On the amount of debts due to the defendant, and extended by the said late Sheriffs, under the said writs of extent	3,402	0	6	

In all which particulars, &c.

[The questions on the exceptions having been argued, the COURT took time for consideration.] [596]

The LORD CHIEF BARON now delivered the judgment of the Court : [601]

We have given this case our most attentive and careful consideration ; and the result is, that we think the Deputy Remembrancer's report is correct. [602]

We think that the Sheriff is not entitled to any poundage on

THE KING
v.
VILLERS.

the sum of 5,000*l.* which was paid by the defendant's sureties in order to obtain the release of his person. Poundage is allowed to the Sheriff by the statute, for his care, pains, and charges in executing the process by levying the money due. What care, pains, or charges can have been incurred by him in that case? On that principle alone we think that the question raised by that part of his claim may be disposed of.

We are also of opinion, that he is not entitled to poundage on the debts collected by him in the county, under the circumstances stated in the report. Those debts were not received by him as Sheriff of the county of Coventry, in consequence, probably, of some arrangement for that purpose, unconnected with his character and power as Sheriff.

As to the claim of poundage on the sums paid by the Receiver appointed by the Court, it would be quite wild to think seriously of that for a moment. For the same reasons as I have already stated respecting the debts collected, we think he is not entitled to poundage on the amount of the rents received by him.

[*603]

As to the money found and seized by the *Sheriff in the defendant's house, which is the subject-matter of the first exception, we have directed inquiries to be set on foot in the office of the Deputy Remembrancer, as to what has been the usual practice in such cases; and we find that it has always been considered there, that the Act of Parliament does not authorise the allowance of poundage on money so found, although, in some instances, it has been allowed, as between the Crown and the party. We know, however, that in cases of extents, the practice in certain cases is not necessarily to be regarded as proving the law; for parties do not always consider it expedient to dispute the matter. The writ of extent, certainly, orders the Sheriff to seize all such sums of money as the defendant hath in his bailiwick, in whose hands soever the same may then be; but we must not lose sight of the words of the Act of Parliament on which the Sheriff's right to poundage is founded. Giving strict attention to that, and the form of the writ, I am of opinion that the sums of money there meant are such sums as the Sheriff should receive, not from the Crown-debtor himself, but from other persons indebted to him, or having his money in their hands.

We are of opinion that these exceptions cannot be supported
and they must therefore be

THE KING
v.
VILLERS.

Disallowed with costs.

[At a subsequent stage of this case (1823) an order was made
charging the Sheriff with interest on the sums retained in his
hands contrary to the law laid down by the Court of Exchequer
as above reported.]

[11 Price,
575—592.]

K. B. HILARY TERM.

WHITE *v.* GEROCK.

(1 Chitty, 24—27; S. C. 2 Barn. & Ald. 298.)

1819.

Jan. 25.

[24]

Declaration that plaintiff was author of a book, being a musical composition called "Captain Wyke," is supported by shewing that the tune was only one of a collection of tunes called "White's Collection of New and Favourite Tunes, as performed at all fashionable Assemblies, arranged for the Piano-forte." An author does not forfeit his copyright by having sold manuscript copies of the work before it is printed and published.

ACTION upon the 54th Geo. III. c. 156, s. 4,† for pirating a book. At the trial before Bayley, J. at the sittings at Westminster after last Term, the plaintiff had a verdict with damages, the learned Judge giving the defendant leave to move to enter a nonsuit, upon a question of variance. The declaration averred, That the plaintiff was the author of a certain book, being a musical composition called "Captain Wyke." There were counts for pirating the whole book, and others for a part. To support the averment that the plaintiff was author of a certain book called "Captain Wyke," he gave in evidence a book entitled "White's Collection of New and Favourite Dances, as performed at all fashionable Assemblies, arranged for the Piano Forte." It appeared the composition in question was one of this collection, was sewed up along with others, and in fact occupied only part of a leaf, on the other side of which was some other tune. At the trial, it was objected that the allegation in the declaration was not supported by this evidence, it appearing that the publication in question was not a book, but only part of a book. The learned Judge, however, overruled the objection, holding that as

† By this statute (repealed by 5 & 6 Vict. c. 45) it is enacted, that the author of any book composed, and not printed and published, or which shall thereafter be composed and printed and published, and his assignee, shall have the sole liberty of

printing or reprinting such book for the full term of twenty-eight years, &c. By the Act 5 & 6 Vict. c. 45, which gives the copyright for a longer term, "book" is expressly defined (s. 2) as including a "part of a volume," &c.—R. C.

the tune pirated was a distinct part of the collection given in evidence it satisfied the words of the declaration.

WHITE
v.
GEROCK.

[25]

Campbell now moved for a rule to shew cause why the verdict should not be set aside and a nonsuit entered, upon two grounds : 1. That the averment in the declaration was not made out by the evidence ; and 2. That the plaintiff had forfeited the protection of the Copyright Act by having published in manuscript many thousand separate copies of the tune, before it was printed in the form it now assumed. As to the first, he was not prepared to contend that a single sheet might not be a book, but his argument was, that the tune pirated was not one entire composition, and that there was a difference between a part and the whole. There was no evidence before the Court that the tune called “ Captain Wyke ” had ever been printed and published on a separate sheet ; for the only shape in which it had been printed and published, was as part of a collection called “ White’s Collection of New and Favourite Dances, as performed at all fashionable Assemblies, arranged for the Piano Forte.” It was impossible therefore to say that the part was likewise a book, as well as the whole collection ; it could not be both part and whole at the same time. This was not like the case of a volume divided into several parts or books, such as the *Iliad* of Homer. To apply the term book to this publication, would be a total misapplication of the sense and meaning of the Legislature in framing the 54th Geo. III. c. 156. It was no answer to the objection to say, that the tune in question was separate in itself, and therefore might be called a book. With equal propriety might a person say, who had published a tale called “ *Aladdin, or the Wonderful Lamp*,” that he was author of “ *The Arabian Nights Entertainments* ” ; because the former would only be a part, and the latter the whole. The statute itself made a distinction, in the very section on which this action was founded, between a book and a sheet. If it could be said that this tune was a book, every bar of it, *nay, every note of it, might with equal propriety be called a book, for to such extent must the argument go if it could be sustained. Now, as to the second point ; it was proved that the plaintiff had, a year or two before, published several

[*26]

WHITE
v.
GEROCK.

thousand separate copies of this tune in manuscript at one shilling each. By having so done, he had forfeited the protection given by the statute of Anne, c. 19, s. 5;† for by that statute the printing and publishing was a condition precedent, before the party could entitle himself to the copyright. Upon these grounds he submitted that the defendant was entitled to enter a nonsuit.

ABBOTT, Ch. J. :

I am of opinion that the words of this Act of Parliament; mean all original compositions, whether they are large or small, and are consequently entitled to the protection intended by the Legislature. It has been held that a musical composition is a book, and that an action is maintainable for pirating a single sheet of music.§ The only distinction here is, that this piece of music is found in company with others instead of being printed by itself; and it seems to me, that that does not make any difference in the principle of the question. Many different books or subjects may be found in one, but that is no reason why each should not have the protection of the statute. As to the second objection, it appears to me that the Legislature never intended to deprive an author of the benefit of copyright, by having sold copies of his work in manuscript before he printed it. The statutes of 8 Anne and 54 Geo. III. are *in pari materia*, and are only intended to enlarge the duration of the copyright. The words [*27] “printed and published” in the former Act, have reference *only to the time at which the author’s exercise of right is to be dated, and therefore the circumstance of the plaintiff having previously published this piece in manuscript, would only vary the period of time at which the twenty-eight years would be calculated. On neither of the grounds suggested does it appear to me that this verdict ought to be disturbed.

The rest of the Judges concurred.

Per CURIAM :

Rule refused.

† Repealed 5 & 6 Vict. c. 45.

‡ 54 Geo. III. c. 156.

§ *Clementi v. Goulding*, 11 East,

244; 2 Camp. 25; and vide *Hime v.*

Dale, ib.; 2 Camp. 27, n., 29, n.; S. C.

Storace v. Longman, 2 Camp. 27, n.

THE KING *v.* THE JUSTICES OF DEVON.

(1 Chitty, 34—38.)

1819.

Jan. 26.

[34]

This Court has no authority to compel the Quarter Sessions by mandamus to give their reasons for their judgments, or make any special entries upon their records; and the rule for a mandamus was discharged with costs.

TANCRED last Term obtained a rule for a mandamus directed to the defendants, commanding them to enter continuances on an appeal between the parishes of St. Mary and Buckland Monachorum, in the county of Devon, and also to alter the judgment of the Quarter Sessions as recorded, by making a special entry upon the record, of the reasons of their judgment.

Casberd and *Peters* now shewed cause against the rule :

This application is quite out of the common *course, and the Court has no authority to grant it. There are only two modes of proceeding with reference to the practice of the Quarter Sessions; first by *certiorari* to bring the proceedings into this Court for its consideration; and, secondly, where the Court below have given a conditional judgment, subject to a case for the opinion of this Court. Under such circumstances the proceedings are removed into this Court, and all matters of law are submitted to it for its determination. The ground upon which this application is made, is, in order that the appellant parish may not be concluded by the judgment as recorded in the Court below; and for this purpose it is required that the clerk of the peace may make a special entry upon the record, reciting the reasons of the Court for the judgment it has given. This Court has no authority to interfere with the Court below, and compel it to give the reasons for its determination. It is not necessary in the judgments even of the Court of King's Bench, that the reasons should appear upon the face of its judgments. The same principle equally applies to Courts of Quarter Sessions. In the case of *South Cadbury v. Braddon*† it was held that the

[*35]

† 2 Salk. 607.

THE KING
v.
THE
JUSTICES OF
DEVON.

[*36]

justices are not bound to express the reason of their judgment in the judgment, any more than other Courts; and if it was otherwise held, it passed without due consideration. The reason of their judgment must be collected from the record, as where judgment is arrested upon an insufficient indictment. If the judgment of the Court below is general, there is no mode of correcting that judgment. It is quite clear that a subsequent session has no control over the judgment of the preceding session. What the parties should have done if they were dissatisfied with the judgment in the terms in which it was given, was to make a special application in the *Court below to make a particular entry on the record. But the parties acquiesced in the judgment then given, and nothing was said about a special entry. They suffered the sessions to elapse, and then they come, not at the beginning of the Term, but on the very last day, to make this application. So that two sessions have elapsed, and this is nothing more than an oblique mode of getting at this question in the shape of a new trial. Such a proceeding was never heard of before. It was competent for the first session to review their own judgment, but as the parties acquiesced in that judgment, it is now too late to disturb the proceedings. It is therefore not open to them to come with this application; but even if it were, this Court has no jurisdiction over such matters.

Tancred in support of the rule for a mandamus :

It is the duty of every Court to enter correctly its judgments, so that the decision shall be conclusive between the litigating parties. If this rule was applicable to superior Courts, it was more peculiarly applicable to the judgments of Courts of Quarter Sessions, because those judgments cannot be corrected by writ of error, or any other mode of review. In this case the difficulty is, that the judgment of the Court below is not applicable to the case then before the justices, because the Sessions have proceeded upon a collateral point, and their order is conclusive as between the two parishes then nominally before the Court; but the fact is that a third parish is interested in the decision, but has not been heard. It is the duty of the Court below to enter

THE KING
v.
THE
JUSTICES OF
DEVON.

[*37]

its orders in such a manner as that they shall speak what the decision of the Court really was, but here the decision is general without explaining upon what ground it proceeded. It is suggested now that the decision of the Sessions was acquiesced in at the time. That is not quite so, because it did not occur *to the counsel at the moment that a special entry was necessary. Certainly there is no direct authority to be found in the books holding that this Court will by mandamus order an inferior Court to give the particular grounds of its judgment. But where justice has not been done to the parties below, there is no other mode of redress than by mandamus to compel the inferior jurisdiction to do its duty. In this case the justices had no jurisdiction to make the order in the terms in which it is expressed, and therefore this Court has power to direct them to express their order in such terms as are applicable to the case.

ABBOTT, Ch. J.:

The difficulty in the way of this application is to shew that we have any authority to grant it. No instance has been cited in which this Court by mandamus ever ordered a Court of inferior jurisdiction to give their reasons for their particular judgment. Although our powers are great, they are not unlimited—they are bounded by some lines of demarcation. I am not aware that we have any power to interfere with the jurisdiction of the Court below, in the way suggested; and as the counsel has not been able to cite any instance of the kind, it appears to me that this application cannot be sustained.

The rest of the Court concurred.

Campbell (amicus Curiae) said that five years since he made a motion exactly similar to the one now before the Court, but it was refused, expressly on the ground that the Court had no jurisdiction to grant a mandamus to the Quarter Sessions to compel them to make a special entry.

ABBOTT, Ch. J.:

All that we have been in the habit of doing is to order them to

THE KING
v.
THE
JUSTICES OF
DEVON.

[*38]

hear and decide cases which they have refused to hear. I disclaim any power *to compel the Sessions to give the reasons for their judgments.

Casberd then applied for costs, suggesting that the justices had been brought here unnecessarily to answer this application.

The Court said, that if the justices had been put to any expense, the rule must be discharged with costs.

Rule discharged with costs.

1819.

Jan. 27.

[49]

WRIGHT AND OTHERS v. WELBIE.

(1 Chitty, 49—56.)

An averment in a declaration on a policy of insurance that A. B. and C. D. and certain persons trading under the firm of Messrs. E. and F. & Co. were interested in the property is a sufficient statement of the interest for the purposes of pleading; and it is sufficient at the trial to prove that there is such a firm as Messrs. E. and F. & Co. without proving the names of the persons who compose the firm. A policy "to any port or ports in the Baltic" is legal, although some of those ports were then in a state of war with this country, and although no licence has been obtained, provided the ship was not sailing to such hostile port.†

ASSUMPSIT on a policy of insurance, dated the 13th August, 1810, upon goods on board a Swedish ship called the *Magdalena* from Gottenburg to any port or ports in the Baltic. The declaration averred the interest to be in "A. B. and C. D. (stating their names) and certain persons trading under the firm of Messrs. William and John Bell & Co." and that the policy was effected for the use of the said A. B. and C. D. and said Messrs. William and John Bell & Co. At the trial before Abbott, Ch. J.

† A policy allowing the vessel to trade to any ports within a particular district, which comprehends ports in a state of hostility, is lawful, unless it appears that a voyage to an enemy's country was in the contemplation of the insured. *Muller v.*

Thompson, 12 R. R. 753 (2 Camp. 610); *Gill v. Dunlop*, 7 Taunt. 204; 2 Marsh. 453; *Holland v. Hall*, 1 B. & A. 53; *Sewell v. Royal Exchange Assurance Co.*, 4 Taunt. 856; *Bird v. Appleton*, 5 R. R. 468 (8 T. R. 562; 1 East, 111).

at the sittings after last Term at Guildhall a verdict was found for the plaintiff.

WRIGHT
v.
WELBIE.

Chitty now moved for a rule to shew cause why a new trial should not be had, or why the judgment should not be arrested; and he made three points: 1st, That it was not proved at the trial who were the component members of the trading firm of Messrs. William and John Bell & Co. as described in the declaration; 2nd, that the declaration did not sufficiently aver who were the persons interested in the goods insured; and 3rd, that the voyage was illegal for want of a licence. Upon the first point he submitted that it was incumbent on the plaintiffs to prove all the members of the firm who traded under the description of Messrs. William and John Bell & Co. It was true that there was evidence given at the trial that there *was a mercantile house trading under the firm of Messrs. William and John Bell & Co., but the term Co. following the names given, it imported that there was some third person in the firm, but no evidence was offered to shew who that third person was, which the plaintiff was bound to do. For this he cited *Ord v. Portal*.† In an action against a third person undoubtedly this would not be an available objection, but between the parties on this record, the plaintiffs were bound to set out all the names of the persons trading under the firm of William and John Bell & Co. The only evidence at the trial was, that a house trading under the firm of William and John Bell & Co. had existed for ten years. The word Co. being a contraction of company, it was of very great importance to shew who were the persons comprehended under that word, because the addition of that word held out to the public a responsibility on the part of the firm in its engagements greater than the mere names that were mentioned would import. Therefore it was incumbent on the parties to shew who the other persons were who had contracted engagements under that firm. This was more particularly necessary in the case of a policy of insurance than in any other, because it must be shewn who were interested in the contract. In this case the evidence raised a presumption that there was some other person

[*50]

† 3 Camp. 240, in the note.

WRIGHT
v.
WELBIE.

[*51]

interested in this firm whose name was withheld from public cognizance. In support of this objection he referred to *Tweed v. Elworthy*.† Secondly, the declaration in this case did not sufficiently aver who were the persons interested in the goods insured. It was clearly established to be absolutely necessary in a declaration upon a policy of insurance, to set out with certainty and with truth who were the persons interested *in the property insured. *Bell v. Ansley*,‡ *Cohen v. Hannam*.§ The reason of this objection was extremely well founded, because the defendant should by the declaration be made acquainted with all the real parties to the contract, in order to prevent the injurious consequences which might result from an omission of this kind. Under the firm of William and John Bell & Co. an alien enemy might be interested, and he might be called even as a witness on the part of himself and the other plaintiffs; nay, under such an averment, one of the plaintiffs might be on the jury to try the cause. If this principle could be evaded the party might be allowed to put in the declaration certain persons trading under the firm of “such a one and Co.” without giving any names at all. He submitted that it was a clearly established principle, that the names of all the persons interested in a contract should be set forth in the declaration. There was a decision of this Court, where it was held that a conviction on the Excise Laws against such a one “and company” could not be supported,|| and therefore upon the principle recognised in this and the other decisions referred to, he submitted that this was a valid objection. Thirdly, it was submitted, that as the insurance was to any port or ports in the Baltic, and some of those ports were then in open war with this country, the voyage was illegal, no licence having been obtained, although in truth the ship sailed to a lawful port.

ABBOTT, Ch. J.:

I am of opinion that we ought not to grant any rule in this case. The first ground on which this application is made is upon

† 14 East, 210.

‡ 14 R. R. 322 (16 East, 141).

§ 14 R. R. 702 (5 Taunt. 101).

|| *Rez v. Harrison*, 5 R. R. 424
(8 T. R. 508).

a supposed variance between the declaration and the evidence. The declaration averred the interest to be in A. B. and C. D. and *certain persons trading under the firm of William and John Bell & Co. I am clearly of opinion that the evidence offered and received at the trial was quite sufficient to support that allegation. Then it is said that the declaration is not sufficient, for not setting out the names of all the parties interested in the subject of the action, and that they ought to be specially named, and that naming them as persons trading under the firm of William and John Bell & Co. is not enough. The practice has long prevailed, of averring the interest in this way in declarations upon policies of insurance, and I am of opinion that it is quite enough so to do. If the question had been raised on special demurrer, perhaps it might be a subject of consideration. I do not say that there might not be some weight in the objection coming before us in that shape, but it is entitled to none now. The practice of pleading in this manner has long prevailed, and I think we ought not to arrest the judgment upon this ground, but leave the party to bring a writ of error, if he can avail himself of it. The third ground of objection is, that this voyage required a licence, for it is said, that by the terms of the policy the voyage is from Gottenburg to any port or ports in the Baltic, and that if the ship had sailed or had intended to sail to the port of an enemy, a licence would be necessary to legalize the voyage. Now there was no proof whatever of any such intention, or that she ever meant to sail to an enemy's port.

WRIGHT
v.
WELBIE.
[*52]

BAYLEY, J. :

I am of the same opinion. As to the first point, I think that the allegation in the declaration is proved, because it is shewn that certain persons trading under the firm of William and John Bell & Co. were interested in the subject insured on behalf of themselves and any other partners, if such there were. The second question is, Whether we ought to arrest the judgment, on the ground that the names of the *persons said to be interested are not stated? Now with reference to that objection, neither of the cases cited bears at all upon the subject. In one of those cases, the question of variance had arisen because the parties

[*53]

WRIGHT
 v.
 WELBIE.

had misdescribed the interest. It was represented that the policy was effected for A. only, whereas it turned out that it was effected for A. and B. In another of the cases, the declaration averred that the interest was in two persons, but it omitted to name one of them, and therefore that case was decided on the ground of an obvious variance. The subsequent case of *Cohen v. Hannam* proceeded entirely on the same ground, adopting the reasoning of the case of *Bell v. Ansley*.† All these cases, therefore, are out of the question. I see no objection to this declaration, on the ground that the plaintiff has described persons as interested trading under a particular firm, and not named them. If the defendant wanted to have known the names of these persons, the proper way to have raised this question would have been by special demurrer on that ground; but not having demurred, I think the objection is cured, and that he is now too late. The third objection is, that the policy being “to any port or ports of the Baltic,” and the voyage being illegal to some ports, it must be illegal as to all, without a licence to go to the ports which happened to be in a state of hostility. Now, if the ship had gone to any of the other ports which were not in a state of hostility, it would not operate as any objection upon the face of the contract, nor does it in fact operate as any objection if the ship was going upon a voyage legal in its inception. I recollect a case very like this,‡ where it was decided that the policy for a voyage to *St. Domingo, part of which was under French dominion in time of war, was not illegal, although described generally as a voyage to St. Domingo, because the law would imply an exception in favour of that part of the voyage which was intended originally to be legal. For these reasons I think there is no ground made out for disturbing this verdict.

[*54]

HOLROYD, J. :

I am entirely of the same opinion. With respect to the motion in arrest of judgment, upon the objection arising on the first point, I think it cannot be sustained, because if the declara-

† 14 R. R. 322 (16 East, 141).

etiam *Muller v. Thompson*, 12 R. R.

† *Blackburn v. Thompson*, 13 R. R.

753 (2 Camp. 610).

382 (15 East, 81; 3 Camp. 61). Vide

WRIGHT
WELBIE.

tion merely stated that certain persons traded under the firm calling themselves William and John Bell & Co. that would be a statement of sufficient certainty. It is to be recollected that they are not the parties to the suit, and that makes a distinction from the case where there are many parties on the record equally interested in the subject-matter of the cause. In this latter case it certainly would be necessary to state the names of the persons engaged in the particular firm, but not so in the present instance. With respect to the question of uncertainty as to the parties interested, there is a case of feoffment, in which it has been said, that in order that the Court may see what was conveyed so as to complete the feoffment, it was necessary to set out the names of all the parties to the feoffment; and so it was said in the case of an assignment or conveyance, where the conveyance took place by attornment; but it was held in both these cases, that the objections were cured by the verdict, and that the Court would presume that every thing was done to make it a legal feoffment in the one case, and a legal conveyance in the other.† At the same time, however, it was said, that the objections *might be available on demurrer, yet as the parties did not take the objections in that stage of the cause, it was then too late to take them, being made after a verdict; and certainly that was a very reasonable answer to the objections. The answer to the objection in this case is, that although the plaintiff has not stated upon the record all that he might have stated, yet he has stated the names of the parties with sufficient certainty, so as not to put the defendant to any inconvenience on the trial. It has been suggested, that an alien enemy might be one of the plaintiffs upon the record, under this general description of the firm. If the defendant thought he was deceived by the uncertainty of the declaration in this respect, he should have demurred to it on that ground; but as he has not done that, he must be taken to have waived his objection to the plaintiff's legal ground of action. The declaration, however, seems to me to be sufficiently supported. On the third and last ground, I concur with my Lord and my brother BAYLEY in the opinion they have expressed,

[*55]

† See cases on this point collected in 1 Saunders' Rep. by Serjt. Williams, 228 a, note 1.

WRIGHT
v.
WELBIE.

and consequently there is no sufficient reason suggested for disturbing this verdict.

BEST, J. :

I have always understood it to be an invariable rule, that where all the averments necessary to a declaration are not sufficiently stated or are omitted, they are the subject-matter of demurrer, and that the time for taking advantage of such objections is before trial. Upon this principle I think the two objections that have been taken in arrest of judgment, come too late, even supposing they were available on demurrer. As to the third objection, if that could prevail, it seems to me that there is not one of the numerous cases in which immense sums have been engaged in Baltic risks, and have been actually paid, which must not have been improperly decided. I recollect from my own experience, when I was at the Bar, that in every one of

[*56] *the cases which were decided during the last war upon Baltic risks, the policies contained the very words in this case, "any port or ports in the Baltic," though many of those ports were in a state of hostility towards this country. If this objection could have prevailed, it is quite impossible that any voyage under a policy "to any port or ports in the Baltic" could ever become legal; and consequently, if a ship sailed to some one of these ports which happened to be in a state of hostility, the insurance on the ship could not be protected. It cannot be doubted, that after the policy is effected the voyage may be rendered legal by the licence of the King in council, and in such case there would be no objection to the policy. We know that during the last war these policies were effected before the voyage commenced; and even supposing the party were to go to a hostile port, there is nothing to prevent him from applying to Government to obtain a licence. Certainly where a party bound himself under a policy to go to a hostile port without licence, he could not alter his course under the policy so effected. But the licence would render the voyage legal before its commencement. I think that being the case, a policy in these general terms cannot be evaded upon the objection taken; and that it signifies nothing that there were certain ports in the Baltic in a state of hostility, it being

reasonably to be supposed that the party had it in his contemplation to obtain a licence for the voyage, or to abandon it. It happens in this case, that the voyage was legal, inasmuch as the party originally contemplated going to one of the ports of the Baltic which was not in a state of hostility; for although he undoubtedly intended to go to Memel, yet still that part of the voyage would not be a violation of the policy. I am therefore clearly of opinion that there is no pretence in this case for granting even a rule to shew cause.

WRIGHT
v.
WEILBIE.

Rule refused.

SNELLGROVE AND ANOTHER, ASSIGNEES OF WHITE,
A BANKRUPT, v. HUNT.
(1 Chitty, 71—75.)

1819.
Jan. 29.
[71]

[In this case a motion for a rule to shew cause why the nonsuit (reported 20 R. R., 708, 2 Starkie, 424) should not be set aside, was refused by the Court (ABBOTT, Ch. J., BAYLEY, J., HOLROYD, J. and BEST, J.). *F. Pollock*, in moving for the rule, cited 1 Saunders (Williams), 4th edit. 291 *g.*, n. 2. ABBOTT, Ch. J. said : *No man entertains more respect than I do for the opinions of that learned writer,] but I think that there is very great reason for the distinction which he seems to contend against. The plaintiff knows or ought to know who are his own partners in a transaction, but he may not be able to ascertain how many persons are liable *to be sued jointly; consequently, the omission of a party who ought to have been a co-plaintiff is a ground of nonsuit; but the omission to make a party a defendant can only be taken advantage of by plea in abatement. * * *

[*74]

[*75]

The other Judges concurred, HOLROYD, J. referring to *Slingsby's* case, 5 Co. Rep. 18 *b.*]

1819.
Feb. 5.

[104]

RICKETTS v. SALWEY.†

(1 Chitty, 104—115; S. C., 2 B. & Ald. 361.)

In an action on the case for disturbance of common, where the right is alleged to be in respect of a messuage and land, it is not necessary for the plaintiff to prove the whole of such allegation; and where the plaintiff declared upon a right of common in respect of a messuage and one hundred and fifty acres of land, with the appurtenances: Held, that the declaration was divisible, and that proof of common right in respect of the land was enough to entitle him to a verdict *pro tanto*.‡

ACTION on the case for the disturbance of the plaintiff's right of common by digging stone, gravel, &c. tried before Garrow, B. at the last Assizes for the county of Salop. The plaintiff declared upon the possession of a messuage and land, and as being entitled to common of pasture in respect thereof; he proved his right in respect to the land, but did not sufficiently prove it in respect to his messuage. The defendant called no witnesses, and the plaintiff obtained a verdict with nominal damages, the learned Judge giving the defendant leave to move to set aside that verdict and enter a nonsuit, if the Court should be of opinion that a nonsuit ought to be entered, on the ground that in this action, which was against a wrongdoer for disturbance of right of common, it was necessary for the plaintiff to prove a right of common in respect to both messuage and lands. In Michaelmas Term last, *Taunton* obtained a rule *nisi*; and

[After argument:]

† This case is also reported in 2 B. & Ald. 361. It was there omitted as containing little of practical importance. But the judgment of BEST, J. as more fully reported by Chitty, seems worth preserving, as an exposition of principles of pleading which, though now sometimes neglected with comparative impunity, are by no means unimportant.—B. C.

‡ Plaintiff may recover in trover, or other action for tort, as sole owner of the property, although it appear in evidence that he was only joint

tenant or tenant in common with others, and the omission can only be pleaded in abatement. *Bloxam v. Hubbard*, 5 East, 407, 420; *Sedgworth v. Overend*, 7 T. R. 279; *Addison v. Overend*, 6 T. R. 766; 1 Saund. 4th ed. 291 h, notes by Serjt. Williams. In an action for disturbing common, plaintiff must prove a right to same kind of common as that alleged, but need not prove the same title as is set out in the declaration, for the disturbance is the gist of the action, and the title only inducement. *Bul. Ni. Pri.* 76; 1 Saund. 346, n. 2.

ABBOTT, Ch. J.:

RICKETTS

v.

SALWEY.

[108]

I have always considered it to be the general rule of pleading, that in an action for a wrong done, if the party proves part only of the declaration, the part proved is sufficient to entitle him to maintain an action; and that he is also entitled to maintain his action, although the defendant is entitled to a part of the subject-matter of the injury. That I consider to be the general rule in pleading in actions of tort. * * Having proved that he is possessed of land in respect of which he has a right of common, the plaintiff is entitled to that right, although he has not proved it in respect to the messuage. Under such circumstances, he is entitled to have a verdict entered for so much in respect of that right of common as has been injured by the defendant. If this decision is wrong, the defendant may avail himself of it in error.

[109]

BAYLEY, J.:

I think this is not an entire, but a divisible allegation, and the nature of the action is such, that if the plaintiff proves so much of his declaration as shews that he is injured, it is sufficient to entitle him to a verdict. * * *

HOLROYD, J.:

[111]

I am of the same opinion, that in this case the allegation is sufficiently proved to entitle the plaintiff to recover in the present action for such part as he has proved. * * *

BEST, J.:

[114]

In the case of a contract the contract is the basis of the action, therefore it must be proved as stated. So in the case of a prescription, it must be proved as stated. Why? Because it is the same thing as a contract—the prescription supposing a contract or deed to have been executed, and therefore by the same rule you must prove it, as set out according to the principle applicable to such cases. But that doctrine has not been extended to cases of tort where the right is mere inducement to the action. In the present case the plaintiff is entitled to judgment for damages, if he has any right upon this common, the right having been

RICKETTS
v.
SALWEY.

[*115]

interrupted by the injurious act of the defendant. All that it is necessary for him to shew is, that he has a right of common, and that that right has been disturbed by the defendant. It is stated and proved, and we must take it, that the damages were given in proportion to the injury done to the right as proved. It has been established since the reign of James the First, in the *case alluded to,† that where the party complains in tort, the title is mere matter of inducement, and that it is not necessary to prove it. There LEA, Ch. J. doubted upon the matter, but the judgment was given in conformity with the opinion of the other three Judges. The same doctrine is recognized by DE GREY, Ch. J., BLACKSTONE, J., and NARES, J. in *Wynn v. White*;‡ and in *Bertie v. Beaumont* § the Court decided upon the very same principle, Lord ELLENBOROUGH saying that the right was mere matter of inducement, and not necessary to be proved in the extent in which it was alleged. All that is necessary to prove in this case is that the plaintiff had some right, which right had been violated by the act of the defendant. The only difficulty that can occur to any man on a subject of this sort is as to the evidence to be used for the purpose of establishing a right to common as appurtenant to land independent of the messuage. There might be some reason for requiring that that point should be proved before the plaintiff could recover. But my LORD CHIEF JUSTICE has completely removed all difficulty upon that point, for in order to effect that object, all that is necessary to do may be done in this case, viz. by taking the verdict specially, according to the proof given on the trial. If the plaintiff had only a right of common in respect of the land, I think the defendant has no right to complain of the verdict as taken in respect of that right. I think the verdict ought to be so, and it appears to me that we should be doing an act of great injustice if we were

† *Eardley v. Turncock*, Cro. Jac. 629.

‡ 2 Wm. Bl. 840.

§ 16 East, 33. This was an action for disturbance of a right of way. In the course of the argument a doubt was suggested whether the occupation of a moiety only of the

cottage in respect of which the right of way was claimed would satisfy the allegation in the declaration; but Lord ELLENBOROUGH said (according to the report in East) that if the plaintiff occupied any part of that which gave him a right of way, the allegation was satisfied.—R. C.

to turn round the present plaintiff and put him to bring a new action against a man who has been proved to be a wrong doer. Under these circumstances I think there is no pretence for a new trial.

RICKETTS
v.
SALWEY.

Rule discharged.

ASTON v. GEORGE.†

(1 Chitty, 200—203; S. C. 2 Barn. & Ald. 395.)

After an order of the Judge referring a cause to arbitration, the parties have no power to revoke the authority of the arbitrator.

1819.

Feb. 11.

[200]

THIS was an action of slander, and by an order of Lord ELLENBOROUGH, the late Chief Justice, at the sittings at Nisi Prius, the cause was referred to arbitration. The arbitrator proceeded in his reference, and had examined all the witnesses for the plaintiff and several on the part of the defendant, when the latter in writing revoked the power of the arbitrator, on the ground that she could not procure the attendance of certain witnesses necessary to her defence, and consequently no award was made. Last Term, Lord ELLENBOROUGH's order was made a rule of Court, for the purpose of applying for the costs occasioned by the reference; and on a former day in this Term a rule was obtained, calling on the plaintiff to shew cause why the rule for making Lord ELLENBOROUGH's order a rule of Court should not be discharged, on the ground that a Judge's order could not be made a rule of Court after the revocation of the arbitrator's authority; and the case of *King v. Joseph*‡ was relied upon.

† This case is also reported in 2 B. & Ald. 395; but the principle (as still applicable) is more fully expressed in the report in Chitty, particularly in the judgments of HOLROYD, J. and BEST, J. The result of the case was expressly embodied in the Act 3 & 4 Will. IV. c. 42, s. 39; but the Act of 1889 (which repeals this) does not explicitly enact that the power of an arbitrator appointed by order of the Court shall not be revocable without

leave of the Court; and the proposition seems now to require the support of the authority of the above decision.—R. C.

‡ 5 Taunt. 452. Per GIBBS, Ch. J. If the plaintiff has by deed covenanted to perform an award, and an award is made, the party cannot by revoking his authority relieve himself from the action of covenant, nor will the Court in such case set aside the award, because it would deprive the other party of his action; if

ASTON
v.
GEORGE.
[202]

[After argument:]

ABBOTT, Ch. J.:

I am of opinion that a Judge's order is mainly distinguishable in its nature from a deed or any other instrument executed between the parties. The parties may revoke a deed or instrument between themselves, but they cannot revoke the authority of the Judge; and therefore I am of opinion that the rule for discharging the rule for making Lord ELLENBOROUGH's order a rule of Court must be discharged.

BAYLEY, J.:

I am entirely of the same opinion. * * *

HOLROYD, J.:

[*203]

The Court has a distinct authority from that which the parties would have by an agreement between themselves. For even supposing the submission itself might be revoked by one of the parties, that would be no revocation of the order of the Judge, *because the parties have no authority to revoke the act of the Judge, and although the submission may be revoked, still if the Judge's order authorizes the arbitrator in making his award, there is nothing to prevent the order being made a rule of Court.

BEST, J.:

The party may revoke the submission, but that cannot put an end to the order of the Judge. If there is any person to be bound under the order, it must be made a rule of Court.† The parties must be bound by the order, but its binding effect is acquired by its being made a rule of Court. The order directs

there is an arbitration bond in a penalty, the penalty cannot be revoked, but the authority may be revoked at any time before the making of the award. The submission should not, under such circumstances, have been made a rule of Court after the revocation of the

arbitrator's authority, and the rule so obtained ought to be set aside.

† The modern practice, as provided for by s. 15 of the Arbitration Act, 1889, dispenses with the necessity of a further rule or order of the Court.
—R. C.

that the arbitrator shall do so and so, and gives him a power to award costs, but the Court by the terms of the order has the power to say what costs the party shall pay. There have been two or three cases cited, but it appears to me that those cases are directly against the argument which has been urged on the part of the defendant. The case of *Hide v. Petit*† is a decisive authority in this case, because it goes to shew that it is necessary to have a rule of Court, in order to empower the Court to grant an attachment for disobedience to the award. And the present case is clearly distinguishable from *Tremenhere v. Tresilian*.‡ I am of opinion therefore that this order must be made a rule of Court.

ASTON
v.
GEORGE.

Rule discharged.

K. B. EASTER TERM.

MOUNTSTEPHEN AND OTHERS v. BROOKE AND OTHERS. § (1 Chitty, 390—392.)

1819.

May 24.

[390]

Plea *puis darrein continuance* of release by one of several plaintiffs set aside without costs, on terms of indemnity against costs being given to the plaintiff who had released the action, though the consent of such plaintiff had not been obtained before action brought, it appearing that no consideration had been given for the release, and that the plaintiffs sued as trustees for the creditors of an insolvent person.

THIS was an action of assumpsit on four bills of exchange drawn by Humphry Mills upon and accepted by the defendants, and payable to the plaintiffs' order; and at the trial at Guildhall, 8th January last, the defendants pleaded *puis darrein continuance* a release, dated 19th of December last, executed by the said Humphry Mills, who was one of the plaintiffs.

[*391]

Marryat and Chitty on a former day moved for a rule to

† 1 Ch. Cas. 185.

520, and note there (7 Taunt. 421).—

† 1 Sid. 452.

B. C.

§ See *Jones v. Herbert*, 18 B. R.

MOUNT-
STEPHEN
v.
BROOKLY.

shew cause why this plea of release should not be discharged, and why the defendant should not pay the costs of the application, upon affidavits stating that the plaintiffs sued as trustees for the creditors of Thomas Pook, and that the plaintiff Mills had received no consideration for the release, and that the same was executed under circumstances sufficient to establish that the release was obtained with a fraudulent intent to defeat the action; and in support of the application, the case of *Legh v. Legh*† was referred to, in which it was held, that if the obligor of a bond after notice of its having been assigned take a release from the obligee and plead it to an action brought by the assignee in the name of the obligee, the Court will not set such a plea aside, and a rule *nisi* was obtained.

[*392

Gurney and Gaselee now shewed cause upon affidavits, which stated that the consent of Mills for the *proceeding in the action had not been obtained, and that he verily believed that there was great risk in the action, that great costs had been incurred, and before he executed a release, he had given notice to the other plaintiffs and their attorneys, that unless he was indemnified against the costs, he would execute a release; and that not having received any answer, and finding that the cause was about to be tried, he had executed the release in order to protect himself from liability to further costs.

The Court having inquired whether Mills owed any debt to the defendants, or had received any consideration for the release, it was admitted that no consideration had passed. Whereupon the Court ordered that the plea of release should be set aside and the release cancelled, the other plaintiffs undertaking to indemnify the plaintiff Mills; and the

Rule was made absolute on these terms without costs.

† 1 Bos. & P. 447. See note to *Jones v. Herbert*, 18 R. B. 520.—R. C.

K. B. TRINITY TERM.

LORD CHARLES SPENCER CHURCHILL *v.* HUNT.

(1 Chitty, 480—489; S. C. 2 Barn. & Ald. 685.)

1819.
June 16.

[480]

Where a declaration stated, that before the publishing of the libel a carriage driven by plaintiff had run against another without plaintiff's negligence or default, and a person had been thrown out and killed, and that defendant published the libel of and concerning the said accident: Held, that although it was proved that the accident did happen through the negligence of plaintiff, yet there was no variance, the accident and the cause of it being divisible. An action lies for a libel stating that although plaintiff was aware of the death of a person occasioned by his improperly driving a carriage against that in which the person was driving, he attended a public ball in the evening of the same day.

ACTION on the case for a libel. The declaration stated in the first count, that before the publishing of the libels by the defendant of and concerning the *said plaintiff hereinafter set forth, to wit, on, &c. a certain carriage, in which one Eliz. Shewin was riding, passing, and travelling on a certain public highway, called the King's Road, in the parish of St. Luke's, Chelsea; and the plaintiff was also then and there, to wit, on the same day and on the same road, driving a certain other carriage, to wit, a carriage called a Dennett, and thereupon it then and there happened, without any negligence, default, or furious driving on the part of the said plaintiff, that the said two carriages came in contact together and accidentally ran against each other, by means whereof the carriage in which the said E. S. was then and there riding, was unavoidably and accidentally overturned, and the said E. S. was then and there cast and thrown out of the said carriage upon the ground, and then and there was so grievously bruised, cut, and injured, that she then and *there died of the said cuts, bruises, and injuries, to wit, on, &c. aforesaid, at the parish aforesaid; yet the said defendant, well knowing the premises, but contriving to injure plaintiff in his fair name and reputation, and to bring him into public scandal, &c. with his neighbours and other subjects of the realm, and to cause it to be believed that the said accident and that the death of the said E. S. was occa-

[*481]

[*482]

LORD
CHURCHILL
&
HUNT.

sioned by the carelessness, negligence, and furious driving of the said plaintiff; and also to cause it to be believed that it was proved in evidence before the coroner's inquest which sat on the body of the said E. S. that her death was occasioned by the misconduct of the said plaintiff; and further intending to vex, harass, and oppress the plaintiff, heretofore, to wit, on the 31st of May, 1818, at the parish of St. Mary le Strand, in the city of Westminster, in the county of Middlesex aforesaid, falsely, wickedly, and maliciously did compose and publish, and cause and procure to be published of and concerning the said plaintiff, and of and concerning the said accident, and of and concerning the evidence given before the coroner's inquest which sat on the body of the said E. S. a certain false, scandalous, malicious, and defamatory libel, containing amongst other things the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the said plaintiff, and of and concerning the said accident, and of and concerning the said evidence, that is to say—"Furious driving. A reader of the 'Examiner' trusts that the editor of that paper will not fail to notice in his next publication the very melancholy accident which occurred in the King's Road, on Wednesday in the last week, occasioned by the furious and careless driving of a certain young nobleman, Lord Charles S. Churchill, &c." [The first count proceeded in this manner to set out the libel, which charged that the accident had been occasioned by the furious and careless driving of *the plaintiff, and that the evidence before the coroner proved that it was so occasioned.] Second count: And the said plaintiff further saith, that the said defendant further intending and devising as aforesaid heretofore, to wit, on, &c. falsely did publish a certain other false, scandalous, and malicious libel of and concerning the said plaintiff, and of and concerning the said accident, containing amongst other things the libellous matter following of and concerning the said plaintiff, and of and concerning the said accident, that is to say, [The libel set out in this count, charged that the accident was owing to the plaintiff's hard driving; and also the following words: "We are informed, but can hardly believe the relation, that though this young nobleman was fully aware of the shocking death of the lady, he on the very evening of the

[*483]

LORD
CHURCHILL
v.
HUNT.

catastrophe attended a public ball.”] Another count charged that the defendant had published a libel of and concerning the said plaintiff, and of and concerning the said accident, containing amongst other things certain other libellous matters of and concerning the said plaintiff, that is to say, &c. &c.† The defendant pleaded the general issue to the whole declaration: and a justification to the whole of the libel set out in the first count, and to such parts of the libels set forth in *the other counts as accused the plaintiff of having occasioned the accident by his furious and careless driving. But there was no justification as to the other parts of the libels, which charged the plaintiff with having “gone to a public ball on the evening of the catastrophe, although he was fully aware of the shocking death of the young lady.” The cause was tried before Bayley, J. at the sittings in Westminster, after last Term, when a verdict was found for the plaintiff (damages, 50*l.*) in respect of that part of the defamatory matter to which the general issue only had been pleaded in the manner above described. The issue on the justification was found for the defendant; so that the jury found that it was not true as stated in the declaration, that “it happened without any negligence, default, or furious driving on the part of the plaintiff, that the two carriages came in contact together and accidentally ran against one other.” The declaration however stated in all the counts, that the libels therein mentioned were composed and published “of and concerning the said accident;” and on the trial it was contended on the part of the defendant, that as the jury found that *such* an accident had not

[*484]

† The libel set out in the third count was in part as follows: “Lord C. has thought proper to commence actions against the newspapers, for having in their account attributed the accident to his hard driving. This is their offence, and this is his mode of clearing himself. His renowned ancestor (meaning John Duke of Marlborough), as our readers well know, took a different method to distinguish himself: he did indeed commence many actions, but then they were public and

glorious ones, which we venture to predict will not be this gentleman’s fate. Our King’s Bench hero (meaning plaintiff) differs from the conqueror in this, that he does not like to come to close quarters, for some of the processes served cannot be noticed for these five months, &c. The whole business, as it strikes us, is of a very disgusting description, and one which we cannot but believe, when his Lordship arrives at years of discretion, he will look back upon with mortification and sorrow.”

LORD
CHURCHILL
v.
HUNT.

happened, that is, that it had not happened in the manner stated in the prefatory part of the declaration, a verdict ought to be entered for the defendant on all the issues. The learned Judge however overruled the objection, and directed the jury to find a special verdict, in order that the defendant's counsel might afterwards have the benefit of the objection taken at the trial. And now,

[*485]

F. C. Williams moved accordingly for a rule to shew cause why the verdict should not be entered for the defendant on all these issues. He contended that the legal effect of the finding of the jury for the defendant, on the first count, was a finding for the defendant on every issue, because the jury found that no such *accident as was stated in the declaration ever took place. They found that the accident, so far from happening without the fault, negligence, and furious driving of Lord Churchill, did happen and result from his furious driving. It was obvious that the averment, "That the accident had happened without the fault, negligence, and furious driving of the plaintiff," was a material averment. The Court would see that the libel was stated to have been published "of and concerning" the accident, which was alleged to have been occasioned by "furious driving;" the averment to the contrary therefore was most material, both with respect to the nature of the injury, the damages to which the plaintiff was entitled, and the description of the libel itself. The defendant was charged with publishing a libel, which libel was "of and concerning the plaintiff, and of and concerning an accident which happened without the fault, negligence, and furious driving of the plaintiff;" and the only accident given in evidence was one which was occasioned by the fault, negligence, and furious driving of the plaintiff.

(BAYLEY, J.: Then there was a justification to every count?)

Certainly, as to the "furious driving."

(BAYLEY, J.: The question for the opinion of the Court is, whether the introductory part of the declaration is to be considered as an entire and indivisible allegation.)

This is certainly the question ; but it was to be observed, that the words “ of and concerning the aforesaid accident ” were repeated in the body of every count, alluding to the allegation in the first count. He contended that that allegation was indivisible, and was in fact part of the libel itself.

LORD
CHURCHILL
v.
HUNT.

(BAYLEY, J. : The accident here is the coming together of the two carriages. That is the accident ; and if that accident was occasioned without the default, negligence, and furious driving of the plaintiff, then he is free from all imputation and blame.)

The accident all *along referred to in the declaration is the coming together of the two carriages, without the fault, negligence, or furious driving of the plaintiff. The Court must see that no libel was written of such accident, because the jury found that no such accident had happened ; for they found that it had been produced by the negligence and furious driving of the plaintiff. The accident, and the cause from which it proceeded, were inseparable. Lord MANSFIELD, in *Rex v. Horne*,† held, that in a declaration which charged certain words to have been written “ of and concerning his Majesty’s Government and the employment of his troops,” the words “ of and concerning ” were sufficient introduction to the matter contained in the libel, and a sufficient averment that it was written “ of and concerning the King’s Government and the employment of his troops.” This case was subsequently removed by a writ of error to the House of Lords, when DE GREY, J. said, it is put upon the record by these words, “ that the defendant wrote and published such a libel of and concerning his Majesty’s Government and the employment of his troops.” This is an averment, for the fact is, that “ he wrote and published the libel ; ” and the circumstance connected with that fact, and which therefore makes a part of it, is, that “ he wrote and *published the paper or libel ” of and concerning his Majesty’s Government and the employment of his troops. If the jury, upon the defence set up, had found that the libel was not published relative to the King’s Government or the employment of his troops, the information was not proved : for it contains an entire proposition. And if it had appeared, that

[*486]

[*487]

† Cowp. 672.

LORD
CHURCHILL
v.
HUNT.

the paper related to a voluntary act of the troops only, and not to an employment of them by Government, the information would have been false, because the prosecutor would have failed in the proof of the proposition, that it was written “of and concerning the King’s Government and the employment of his troops.” The proposition thus laid down by DE GREY, J. was the same in the present instance. Every count incorporated the accident with the cause; and the jury having found for the defendant on the first count, the finding should have been the same way in all the rest. It was clear, from the doctrine laid down in the case referred to, that the accident and the cause were not divisible. The declaration averred, that the accident happened without any fault, negligence, or furious driving of the plaintiff, and the averment in every count was the same; and as the only accident which was given in evidence was that which had occurred by the fault, negligence, and furious driving of the plaintiff, the jury negatived the existence of an accident of a different character, and their finding was in effect a finding for the defendant on the whole of the counts.

ABBOTT, Ch. J.:

It appears to me that the word “accident” applies to the collision of the carriages, and not to the specific injury done to the persons riding. The plaintiff alleges that the accident was without his fault, and the defendant alleges the contrary. This seems to me to be the effect of the introduction on the record [*488] “of the words” of and concerning that accident; *that is, the accident which he alleges occurred without his fault. Taking that to be the meaning, then the libel does relate to the accident which the plaintiff has alleged to have taken place without his fault. I am of opinion, therefore, that the direction of the learned Judge was right.

BAYLEY, J.:

The plaintiff is not bound to prove the whole of his introduction. It appeared to me on the trial, and I am of the same opinion still, that the allegation in this declaration was in substance a divisible allegation, containing two statements; the

one referring to the collision of the carriages, and the other to the cause of that collision; each of which being entire, the allegations are distinct and several, and the plaintiff was not bound to prove both.

LORD
CHURCHILL
v.
HUNT.

HOLROYD, J. :

I think that the allegation on the record, that the circumstance happened without the fault and furious driving of the plaintiff, is not part of the description of the accident, but is a distinct allegation concerning that accident. It is not necessary that such allegations should be proved. The accident was the collision of the carriages; and in the pleadings exception is only taken to the cause by which that accident was produced. It appears to have been so considered by the defendant himself; because, when the plaintiff alleges that the accident happened "without his fault, negligence, or furious driving," he, the defendant, says, "the said accident happened by the furious driving of Lord Churchill." Therefore the allegation respecting the cause of the accident is distinct from the accident itself. That being the case, the finding of the jury that the accident did happen through the furious driving of the plaintiff, in my opinion does not disprove any part of the declaration which is material to the question at issue.

BEST, J. :

[489]

What is the meaning of the word "accident," as used in the present instance? It appears to me to be the unfortunate result of a particular course of conduct pursued by the plaintiff. The word "accident" only imports the event, and not what tended to it. The result, and the cause from whence it arose, are clearly divisible. In the case of *The King v. Horne*, the libel was not "Of and concerning the King's troops," but "Of and concerning their being employed." The proposition stated in the libel was therefore indivisible.

Rule refused.

1819.
June 28.

DOE ON THE DEMISE OF LOVELL v. ROE.†

(1 Chitty, 505—506.)

[505]

In ejectment for a stable, service of the declaration by nailing it to the door of the stable, no person being therein, and then going to the defendant's house and informing him of what had been done: Held insufficient to ground a rule that the service be deemed good.†

TINDAL moved for a rule to shew cause why the service of the declaration in ejectment in this case should not be deemed good service. The premises *mentioned in the declaration were

[*506]

† See now R. S. C. Ord. IX. rr. 2, 9. The cases under the old practice may be still useful as shewing the strictness necessary to be observed in service of a writ for the recovery of land.—R. C.

‡ See next case. It is not sufficient that a notice should have been stuck up on the gateway of premises, where it is not sworn that the defendant keeps out of the way. *Anonymous*, Trin. T. 1814, June 22nd. *Hullock* moved for judgment against the casual ejector, on an affidavit that the declaration had been stuck up on the gateway of the premises; but not swearing that the defendant was out of the way, &c. the COURT held it insufficient. *Rule refused*.

So it is not sufficient to state that the deponent had called at the tenant's house in the morning and again in the evening, and not finding the defendant at home, had nailed the declaration on the most conspicuous part of the premises. *Anon.*, Trin. T. 22 June, 1813. *Tindal* moved for a rule to shew cause why the service of a declaration in ejectment should not be deemed sufficient, on the ground that the person serving the declaration had called at the house of the tenant in the morning, and again in the evening, and not finding him at home either time, he nailed the declaration up on the most conspicuous

part of the premises. *LE BLANC*, J. held that this was insufficient; the case must be carried farther. It should be shewn that the lessor of the plaintiff had done all in his power, and that otherwise the learned counsel must take nothing by his motion.

In order to dispense with personal service of a declaration in ejectment, it ought to appear that the tenant keeps out of the way to avoid being served, and the deponent's belief of that fact should be stated. *Anon.*, Trin. T. Wednesday, June 23, A.D. 1813. *Barlow* moved that service of declaration in ejectment might be deemed good service, and the service of rule nisi also. The affidavit stated that the tenant had deserted the premises 15 months, and that the declaration had been served on the tenant's servant-maid on the premises, and that the nature of the declaration had been explained to her; but did not go on to state, that they had searched for the tenant and did not find him, and that they did not know where he was to be met with, and that they believed he kept out of the way to avoid being served. *BAYLEY*, J. said it was not sufficient.

See also *Doe ex dem. Lowe v. Roe*, East. T. 1814, April 14th. *Cross* moved for judgment against the casual ejector, on an affidavit that the declaration had been stuck upon the house, there being nobody in it,

stables, and the deponent went to the premises to serve the declaration, but finding no person in possession he nailed a copy of the declaration against the door, and then went to the dwelling house of the defendant, and informed him what he had done. The Court said this affidavit was not sufficient even for a rule to shew cause, because the deponent had not done what he might reasonably be expected to do for the purpose of properly serving the declaration.

DOE
v.
ROE.

Rule refused.

DOE DEM. TARLUY v. ROE.

(1 Chitty, 506—507.)

1819.
June 16.

[506]

The affidavit upon which to move for judgment against a casual ejector, where the tenant has absconded, must state that the copy of declaration was left as well as affixed on the premises, and that the deponent has used due means to find out such tenant's residence, and verily believes he has absconded.†

COMYN moved for a rule *nisi* for judgment against casual ejector, and that rule might be served in the same manner as the declaration, upon an affidavit stating that the tenant in possession had absconded to avoid arrest, and that the declaration was nailed upon the outer door of the house.

BAYLEY, J. :

You ought to have shewn that you left the declaration there. Upon amending your affidavit, you may take a rule *nisi*, and you may affix the rule *nisi* in the same way.

Comyn accordingly obtained a fresh affidavit, stating, " That deponent did on, &c. affix and leave on the outside of the street

and the neighbours believing that the tenant in possession had absconded,—the affidavit did not state the deponent's belief of the defendant's keeping out of the way to avoid the service. DAMPIER, J. : It is not sufficient to entitle you to sign judgment, that nobody is in the house. If the possession is actually vacant, you must proceed as such ;

but on decided cases almost any thing in the house will prevent it,—as, small beer being in a cellar, 2 Stra. 1064 ; or hay in a barn. Besides, your affidavit to ground this motion should state the deponent's belief that the tenant kept out of the way, or absconded, for the purpose of avoiding the service. *Rule refused.*

† See the notes to the last case.

DOE
v.
ROE.
[*507]

door of the messuage and premises *in declaration mentioned, a true copy of the declaration hereunto annexed, and notice thereunder written; the same messuage being entirely shut up and deserted. And this deponent further saith, that he has made diligent inquiry after John Dixon, the late tenant in possession of the said premises, and whom this deponent hath been informed and verily believes is possessed of the lease thereof, but this deponent doth not know, nor can he learn where he now resides or can be found, so as to serve him with a copy of the said declaration and notice, but this deponent verily believes that he has absconded to avoid being arrested for debt." Upon this affidavit a

Rule nisi was obtained.

1819.
June 29.

[535]

DOE v. RENDELL AND ANOTHER.

(1 Chitty, 535—544.)

Where an ejectment had been brought and judgment recovered in 1798, and the term of the demise laid in the declaration had since expired, the Court refused to grant a rule for enlarging the term and issuing a *scire facias*, the possession having changed, and the person who was the owner having since died.† Writ of possession cannot issue at the distance of 20 years after judgment, without a *scire facias*, to be obtained on motion.

SCARLETT on a former day moved for a *scire facias* to revive the judgment in an ejectment tried at the Spring Assizes, 1798, for the county of Devon, the plaintiff having recovered one-sixth

[*536, n.]

† In the case of *Peaceable v. Watson*, 13 R. B. 552 (4 Taunt. 16), where in an action of ejectment an objection was raised, that the term alleged to *have been demise to the plaintiff had expired before the trial, the learned Judge at Nisi Prius overruled the objection, and the Judge's opinion was afterwards confirmed by the Court, who said that it might be cured by amending. In *Oates v. Shepherd*, 2 Stra. 1272, where the term in an action of ejectment was nearly expiring, it was amended

without any consent from 5 years to 10 years. In *Roe v. Ellis*, 2 Bla. Rep. 940, where the declaration counted (by mistake) of a term which appeared to have expired 12 years before the action brought, it was held, that the declaration might be amended; and the Court said it might be amended by the writ which spoke of a term not yet expired. And in *Vicars v. Haydon*, Cowp. 841, where these last two cases were considered, the Court of K. B. after judgment had been affirmed in an

part of the premises in question, for which judgment was entered *up in the course of the same year, but for which no writ of

DOE
v.
RENDELL.
[*536]

action of ejectment from Ireland, amended the declaration by enlarging the term, although the record was remitted to the Court below in Ireland.

So the day of the demise in a declaration in ejectment may be amended, as where the day is laid before the lessor's title appears to have accrued. *Doe ex dem. Rumford and another v. Miller and Levett*, Hil. 54 Geo. III. Action of ejectment for recovery of the possession of premises at Bethnal Green. The lessors of the plaintiff were landlords of 11 houses let to the defendants, who by their lease covenanted to finish them by Michaelmas, 1813. The lease was to hold from the 25th of March, in the same year. The demise was laid on the 25th of March, to hold from the 26th. The houses were not finished at Michaelmas, and the ejectment was brought for a forfeiture incurred by the breach of covenant. *Park* obtained a rule *nisi* to amend by laying the demise on a day after the forfeiture was incurred. *Reader* shewed cause; but the COURT allowed the amendment on payment of costs, and the plaintiff tried the cause and recovered at the sittings after Term. S. C. Adams on Eject. 2nd ed. 199, n. 5.

See also as to this point, *Anonymous*, Mich. T. 1813, Nov. 24th. *Guselee* on a former day had obtained a rule to shew cause why the day of the demise in a declaration in ejectment should not be altered from the 3rd of April to the 14th of May, a day subsequent to the expiration of a notice to repair, which had been given in order to found the action. The action was brought on the ground of a forfeiture incurred by dilapidations. *Connyn* now shewed cause, and urged that the Court of

Common Pleas would not amend in real actions (see 2 Saund. Rep. 459; 1 Bos. & P. (N. R.) 64, 233; 3 Bos. & P. 453; 2 Bos. & P. (N. R.) 429; 6 Taunt. 193, 5, 6), and that this being the case of a forfeiture, the Court could not allow an amendment. LE BLANC, J.: That seems your strongest ground. *Sed per* Lord ELLENBOROUGH, Ch. J. *et Cur.* I see no reason why we should draw a distinction as to amendments to be made in cases of forfeiture from other cases. There was a distinction, in former times, as to amendments in penal actions, but it is not now attended to. *Mestaer v. Hertz*, 3 M. & S. 450; 2 Burr. 1099; 6 T. R. 173. We think, therefore, that there is no objection to this amendment, and that the rule must be made absolute.

So a declaration in ejectment has been allowed to be amended in the description of the premises, as by leaving out the word tenements, after judgment and a writ of error brought. *Anonymous*, Trin. T. 1814, June 27. *Barrow* on a former day had moved for a rule calling on the defendant to shew cause why the declaration in ejectment should not be amended (although after judgment given, and a writ of error brought in the House of Lords), by striking out the words "five tenements." The COURT granted a rule *nisi* on payment of costs. The *Attorney-General* and *Marryat* now shewed cause, and urged that the application came too late after verdict and judgment, where there was nothing to amend by. DAMPIER, J.: The term in the demise has been altered after verdict, and there is a case to that effect (*Vicars v. Haydon*. Cowp. 841; and see *Oates v. Shepherd*, 2 Stra. 1272), and in that case there could have been nothing to amend by. BAYLEY, J.: There are

[537, n.]

DOE
v.
RENDELL.
[*537]

possession had been sued out. The object of *the application was to enable the lessor of the plaintiff to obtain possession of that part of the premises which had been so recovered. The motion being then discussed, it appeared upon affidavit, that the term laid in the declaration was only for seven years, and had now expired, and consequently that the writ of *habere facias*, which must be issued upon this motion, would be irregular, and inconsistent with the previous proceedings. It appeared also, another tenant was now in possession of the premises. The Court therefore suggested, on the authority of *Vicars v. Haydon*,† that the plaintiff, before he could move for the *scire facias*, should take a rule to shew cause why the declaration should not be amended, by enlarging the term ; and accordingly a rule *nisi* was drawn up for that purpose.

[*538]

Casberd now shewed cause against both rules, the one for enlarging the term, and the other for the *scire facias* to revive the judgment ; and as to the latter, he submitted a preliminary objection, contending on principle, and the authority of decided cases, that the rule *could not be made absolute, inasmuch as the tenant now in possession of the premises was not a party before the Court. There were originally two defendants in the action of ejectment ; one, Elias Tuckett, the proprietor of the premises, and the other, James Rendell, his tenant, whose interest in the property had now ceased, by the expiration of his lease. Since that time another tenant had become possessed of the property, and was now in possession, but was not served with this rule, which he contended he ought to have been. Though he now appeared for James Rendell, in pursuance of the rule served upon him, as the surviving defendant (Elias Tuckett having since died), still it was necessary that the tenant in possession should be served with the rule, because, for any thing that appeared, James Rendell had now no interest in the property.

many cases to that extent. The Court therefore made the rule absolute upon payment of costs, but said that the writ of error must not be quashed, for there might be other

error, and if not, the defendant would proceed therein at his peril. See other cases, *Adams on Ejectment*, 2nd ed. 25.

† *Cowp.* 841.

Scarlett said, that he had an affidavit, shewing that *Rendell* was now interested in the premises, and was competent to shew cause against this rule, being the only surviving defendant on the record. Whereupon the Court intimated, that they would, in all events, call upon the other side to shew cause against the rule for amending the declaration.

DOR
v.
RENDELL.

Casberd then shewed cause, and contended that no case could be found in the books to warrant the Court in amending a declaration in ejectment, served more than twenty years ago.

* * *

Scarlett and *Bingham*, *contra* :

[541]

The only remedy which the plaintiff has in this case, under the circumstances stated, is to sue out a *scire facias* to revive the judgment, in order that he may have execution for the one-sixth of the premises recovered in 1799. This is the proper course to be adopted, as appears by the case of *Withers v. Harris*.† But in order to give the plaintiff the advantage of this remedy, it is necessary for him to enlarge the term, so that no formal objection shall stand in the way of discussing the question. The enlargement of the term is the usual and proper mode of proceeding, with a view to raise the question, in order that the plaintiff may not be driven to his writ of right. There are several authorities to shew that the Court will enlarge the term for this purpose. *Doe v. Pilkington*,‡ *Roe v. Ellis*,§ and *Vicars v. Haydon*.|| As to the objection that the proper parties are not before the Court, in consequence of changes having taken place in the ownership and possession of the property, it is no answer to the present application; because if such changes have taken place, they may in their proper season operate to prevent the plaintiff from having execution. This is only an application to the Court for a *scire facias* to revive the judgment; and if upon the *scire facias* being brought, it appears that the defendants have a title, acquired since the first ejectment, it may be pleaded in answer to this proceeding, and the defendant will have the full benefit of it. Therefore the circumstance of changes having taken place in the

† 1 Salk. 258.

§ 2 W. Bl. 940.

‡ 4 Burr. 2447.

|| Cowp. 841.

DOE
v.
RENDELL
[*542]

property is no objection to the present *motion, because at a future time it may be shewn, in pleading and in evidence, as good cause why the judgment should not be revived. But the persons now in possession must then shew a distinct title acquired since. In the mean time, however, the objection arising from the lapse of time will not be taken away by making this rule absolute. The proceeding by *scire facias* is certainly not new. *Proctor v. Johnson*.† And this is the only way in which the plaintiff can proceed to obtain execution upon the verdict he has recovered; and the Court will observe, that no objection is suggested to his title. It cannot be urged that the subsequent ejectments brought are to operate as a waiver of the judgment upon the first, because this could not be done except by a release under seal. Where a party has neglected to sue out execution upon a judgment recovered, lapse of time is no objection against him. Undoubtedly in this case an amendment must be made in the declaration, by enlarging the term, so as to entitle the plaintiff to sue out execution. The term is merely a fiction, in order to try the question; and the Court for that purpose will accede to this motion.‡

ABBOTT, Ch. J. :

I am of opinion, that even if this declaration had been sufficiently large to answer the purpose, we ought not, under the circumstances of this case, to allow a writ of *scire facias* to issue. The application for an amendment of the declaration, by enlarging the term, is purely to the discretion of the Court. No doubt the Court will refuse the application, where they see great mischief likely to arise from granting it. I go further; I think we ought not to grant it, unless it is shewn that mischief will not arise. In such a case as this, I must have the negative proved :
[*543] here the negative is not proved. The circumstance *of the plaintiffs having obtained judgment for one-sixth of the premises, would not have concluded the defendant, even if he had taken out execution; because the defendant might have brought another ejectment against the plaintiff, and he might have tried the

† 1 Lord Ray. 669.

‡ *Outes v. Shepherd*, 2 Stra. 1272.

question over again; and for aught I know, he might have good ground to support his case. Are we therefore now to place him in a worse situation than he would have been in then? Had he been obliged to bring an ejectment to recover back the premises, he might then have called witnesses to support his title, many of whom may now be dead, and others not to be found. It is admitted, that the owner of the estate against whom this ejectment was brought, is now dead, and that the then occupier is not in possession. The freehold of the property has passed in a course of descent, according to the limitations of the settlement, from the grandfather to his grandsons, and the grandsons may have no means of knowing any thing of the title, which the grandfather might be expected to know. I therefore think we ought not to grant this application; for by granting it, we should be giving encouragement to procrastination and delay, which ought not to be encouraged. I am of opinion that both rules must be discharged.

DOE
v.
RENDELL.

BAYLEY, J. :

The authorities which have been cited say, that a party shall not be precluded by the expiration of the term from bringing a *scire facias* upon a judgment, but may apply to the Court to enlarge the term; but they do not mean to say, that because the party is at liberty to make such an application, the Court will therefore permit the amendment in a case where no amendment ought to be made. To grant a *scire facias* in this case, would be an act of injustice to the defendant, because the death of witnesses may have since occurred, who might have been able to give *a complete answer to the writ. I therefore agree with my Lord, that these rules must be discharged.

[*544]

HOLROYD, J. :

I am of the same opinion. The effect of the motion is this:—the plaintiff cannot bring a fresh ejectment, in consequence of the expiration of twenty years; he therefore wishes to amend the declaration by enlarging the term, in order to support his *scire facias*. I think the defendant has a right to hold him strictly to the pleadings as they were first stated on the record;

DOE
v.
BENDELL.

and I am of opinion that the present motion ought not to be granted, for if it were, the plaintiff, who has been guilty of laches in not suing out execution, would be placed in a better situation than he would have been in when he first obtained judgment.

BEST, J. concurred.

Rule discharged.

1819.
June 30.

THE KING v. HARRISON.

(1 Chitty, 571—572.)

[571]

The Court will not grant a *certiorari* on behalf of the defendant to remove an indictment from the sessions, on an affidavit that he was advised that difficult points of law might arise.† But leave was given to renew the motion at chambers, if a better affidavit could be obtained.

THIS was an indictment found at the Lancashire Sessions against the defendant, for disobeying an order of maintenance; and

[572]

Starkie moved for a *certiorari* to remove the proceedings into this Court, upon an affidavit of the defendant, stating that this

† It seems that at least the points of law which it was conceived might arise should have been stated, so that the Court might have been enabled to judge of the reasonableness of the defendant's prayer. In *Nehuff's* case, 1 Salk. 151, where a *certiorari* was sought for to remove an indictment at the Old Bailey for a cheat, and the case was that the defendant borrowed 600*l.* of a *feme covert*, and promised to send her fine cloth and gold dust as a pledge, and sent no gold but some coarse cloth worth little or nothing, and the defendant offered to try the indictment the same Term, which would be a benefit to the prosecutor, who by the course of proceedings at the Old Bailey could not try it so soon, the Court granted a *certiorari* because there was no criminal offence but only a breach of confidence on the part of

the defendant, and the defendant was therefore entitled to the *certiorari* because it was an absurd prosecution and the defendant offered to try it in that Term.

The Court have granted a *certiorari* to remove an indictment from the Old Bailey where the defendant was a public officer whose duties required his attendance at a great distance from the metropolis. *Anon.*, East. T. 1815, May 3rd. *Gurney* moved for a *certiorari* to remove an indictment from the Old Bailey, in order that the defendant might be tried at Gloucester, where he resided, and where he held the office of Deputy Register of the division of Gloucester. The defendant was indicted for using improper influence with the jury in order to promote an action for his fees. This motion was made on the ground of the distance at which the

was an unusual proceeding, that he was advised that several matters of law of the greatest importance would arise upon the trial of the indictment, and that it was fit and proper it should be tried before persons learned in the law.

THE KING
v.
HARRISON.

HOLROYD, J. :†

You must have a stronger affidavit than this to entitle the defendant to a *certiorari*; and if one can be obtained, the motion may be renewed at chambers.

Rule refused.

K. B. MICHAELMAS TERM.

THE KING, ON THE PROSECUTION OF HUNT, v. — AND — JUSTICES OF LANCASHIRE.

(1 Chitty, 602—603.)

1819.
Nov. 8.

[602]

The motion for a criminal information must be made by the law officers of the Crown, or a barrister, and not by a private individual.

This application was made by the prosecutor in person, for a rule to shew cause why a criminal information should not be

defendant lived from London, where the indictment was intended to be tried; the hardship which was imposed on the defendant in his being obliged to come up twice, once for pleading and another time for trial; and the inconvenience which would result therefrom on account of the defendant being a public officer. The COURT said they were afraid that this would lead to a precedent for removing every indictment from the Old Bailey, where the party resided more than a hundred miles from London. But on the ground of his being a public officer, and such an officer as a Deputy Register, whose personal attendance is daily necessary for the purpose of granting probates, &c.

the *certiorari* was granted. See 1 Chitty's Cr. L. 375.

It is not a sufficient ground for the issuing of a *certiorari*, that prejudices existed against the defendant, unless there was some prejudice in the Court below. *Rex v. Matthews*, East. T. 1815, April 27th. Reader moved for a *certiorari* to remove an indictment for compounding an action for penalties for carrying too many passengers by a coach, on the ground of prejudice against the defendant. Lord ELLENBOROUGH, Ch. J.: It is not a sufficient ground, unless you state that some prejudice existed in the Court below; and as no such ground is shewn, the rule must be refused.

† The only Judge in Court.

THE KING
v.
THE
JUSTICES OF
LANCASHIRE.

filed against certain magistrates, acting for the division of Manchester in the county of Lancaster, for alleged misconduct in dispersing a public meeting held within their jurisdiction, on the 16th of August last.

[603]

The COURT, upon understanding the nature of the motion, immediately interposed, and said that it was not competent for a private individual to apply for a criminal information. Such motion could only be made by the law officers of the Crown, or by a barrister, who was in the nature of a public officer. They laid it down as a general rule, applicable to all proceedings in the name of the King, that no private individual could be heard as an advocate in a court of justice. With respect to a case which had been cited, of *The King* on the prosecution of *Charles Pitt v. Huskison* and others, in which the late Lord ELLENBOROUGH, Ch. J. had allowed the prosecutor to address the jury in stating the case for the prosecution, they stated that that decision was not sufficient to sustain the present application; because that noble and learned Judge by whom it was decided afterwards expressed himself to be in error in having permitted Charles Pitt to address the jury, thereby sanctioning the principle upon which the present applicant could not be heard.

The rule was accordingly refused.

1819.
Nov. 23.

[651]

IN RE WILLIAM JONES.

(1 Chitty, 651—654.)

The Court will not interfere on motion against an attorney for negligence in the discharge of his professional duty, if there be no fraud; and therefore where an attorney, who was retained to defend an action, allowed judgment to go by default, and afterwards desired his client not to attend to endeavour to mitigate the damages, because the proceedings might be set aside for irregularity, when in fact they could not; and in the event execution was sued out, and the client paid the sum claimed and costs: Held, that the only remedy against the attorney was by action.

CHITTY moved for a rule to shew cause why an attorney of the Court should not pay 85*l.* 15*s.* being the debt and costs in an

action brought against the *applicant Jones, and which he had been obliged to pay in consequence of the alleged negligence of the defendant. The circumstances of the case, as they appeared from the affidavits, were as follows. Jones having been served with a copy of a writ, at the suit of a person to whom, it was sworn, he was not in any manner indebted, employed the attorney against whom this motion was made, to appear and defend the action. This gentleman accordingly being apprised of the nature of the defence, undertook the defence, and engaged to proceed to trial; but instead of doing so he suffered judgment to go by default, and afterwards dissuaded his client from attending on the execution of the writ of inquiry, assuring him that the proceedings might be set aside on the ground of irregularity. Eventually, however, no motion was made for the purpose of setting aside the proceedings, and a *feri facias* was sued out against Jones, who was compelled to pay the supposed debt and costs to prevent his goods from being taken in execution. The affidavits also stated that Jones had never countermanded the retainer, that he repeatedly urged his attorney to defend the action, and informed him that he would proceed at any cost; that the attorney never applied for money, nor gave any other reason for the course which he had adopted.

IN RE JONES.

[*652]

Chitty in support of the rule, referred to *Rex v. Tew*, Sayer's Rep. 50, in which, upon a rule to shew *cause why an attachment should not be awarded against the defendant, it appeared that Tew, who was an attorney, had received sixteen pounds from his client who was a plaintiff in a cause, but that after giving notice of trial he had neglected to fee counsel, or to attend the trial of the cause, and that in consequence of this neglect, his client was nonsuited and afterwards thrown into gaol. The Court made the rule absolute. He referred also to *Rex v. Bennet*,† in which the Court granted a rule to compel an attorney to pay the debt and costs to his client, on the ground that he had discharged the defendant on taking a security which he knew to be worth nothing; and to *Collins v. Griffin*,‡ in which the Court

[*653]

† Sayer, 169.

Fielding, 2 Burr. 654, also cited in‡ Barnes, 37; and see *Rex v.* support of the rule.

IN RE JONES. was moved against the defendant's attorney for not acquainting the defendant that he had received notice of trial, whereby the plaintiff obtained a verdict without defence. It appeared, upon shewing cause, that the omission was entirely owing to the neglect of the agent of the defendant's attorney. But the Court held that that was no defence for him; that the attorney was answerable to the client, the agent to the attorney, that the party ought not to be put to his action, but that the matter should be determined in a summary way. The Court therefore granted the attachment. It was submitted that these decisions furnished a sufficient authority for proceeding against the attorney by a summary application; and the grossness of the neglect of which he had been guilty, and the inadequacy of any other remedy by action to answer the purposes of justice, were pressed upon the Court in support of this motion. *Sed per*

BEST, J. :

[*654] The cases referred to are insufficient to *sustain the present application, and there is no instance of the kind within my knowledge. The present charge against the attorney is that of mere negligence, which can only be the subject of an action. Had fraud been imputed, it might be the foundation of this proceeding; but the case now laid before the Court is not one in which it can interfere upon motion.

Rule refused.

1819.
Nov. 23.

THE KING v. JOHN MIDDLETON.

(1 Chitty, 654—658.)

[654]

The Court will not grant a *habeas corpus* on the ground of an alleged restraint which does not illegally interfere with personal liberty.†

TINDAL moved for a writ of *habeas corpus* to bring up the body of Mary, the wife of John Middleton, or for a rule to shew

† Vide *Atwood v. Atwood*, 1 Prec. Cha. 492; *Bridgman's Index*, tit. Baron and Feme, 9, sec. 284, &c.; 13 East, 195. The only ground of applying for a *habeas corpus* is that

some restraint is put on the personal liberty of the party. *Anon. Trin. T.* 1814, June 14th. *Gurney* moved for a *habeas corpus* to bring up an apprentice to be discharged. *Sed per*

cause why certain persons named in the affidavits should not have free access to the said Mary, at all proper and seasonable times, for the purpose of consulting with and advising her touching the disposal of certain separate property, of which she was possessed by virtue of her marriage settlement. The affidavits upon which the motion was made stated in substance, that in the month of September, 1815, a marriage settlement was executed previous to the marriage of Mr. and Mrs. Middleton, by which certain separate property belonging to the latter was vested in her and to her separate use, with power of executing a trust deed in pursuance of the settlement; that the marriage accordingly took place in that month, and that from that time to the present, the parties had lived together very unhappily; that *Mrs. Middleton was now extremely ill and not likely to live long; that she was desirous, as the deponent was informed and verily believed, of executing a power of appointment of trustees to dispose of her said separate property to her own use; that in pursuance of her wish so expressed, an attorney of this Court attended at the house of the said John Middleton, on the 18th day of this instant month of November, together with the necessary witnesses for the purpose of procuring the signature of and execution of the same by the said Mary Middleton, when the said John Middleton refused access to the said Mary, and desired the said attorney to walk out of the house. In addition to this statement there was an affidavit of a surgeon, who deposed, that during the last six weeks he had attended the said Mary, and that she was now in a dangerous state of health, too ill to be removed, and not likely to live a month. In support of the motion, the cases of *The King v. Wright* and others† and *The King v. Turlington*,‡ were referred to.

THE KING
v.
MIDDLETON.

[*655]

ABBOTT, Ch. J. :

I am of opinion that we cannot grant either part of this

LE BLANC, J. : It is not a case for a *habeas corpus*. The personal liberty of the apprentice is not restrained. Per CUR. : Rule refused. See also as to the *habeas corpus* for bringing up an apprentice, *Rex v. Reynolds*, 6

T. R. 497; *Ex parte Lansdown*, 5 East, 38; *Rex v. Edwards*, 7 T. R. 745.

† 2 Burr. 1099.

‡ Id. 1115.

THE KING
C.
MIDDLETON.

[*656]

alternative motion. With respect to the first, we cannot grant a *habeas corpus*, unless there distinctly appears to be some improper restraint on the personal liberty of the party desired to be brought up. Now it is sworn that this lady is in such a state of health that it would be impossible to remove her, even supposing it to be satisfactorily made out, that she is under personal duress. No good therefore could be attained by granting a *habeas corpus* in the first instance. The utmost we could do in all events, under these circumstances, would be, to grant a rule to shew cause why a *habeas corpus* should not issue; but I am extremely doubtful whether this Court *can interpose in a case of this description. It appears to me that the more proper course of proceeding would be, to apply to the Court of Chancery. The cases cited from Burrow's Rep. do not seem to authorise this part of the motion. The first, namely, *The King v. Wright* and others, was a motion for a criminal information against the defendants for having, as was alleged, used improper means of influencing a female, named Savage, to make a will, and the Court refused an *habeas corpus*, because she was too infirm and weak to be brought into Court. The second case was that where the Court granted a *habeas corpus* to bring up the body of a female who was improperly confined in a mad house at the instance of her husband. With respect to the alternative part of the motion now submitted to the Court, it does not appear to me, that either of those cases is an authority for this purpose; and I know no instance of this description in which this Court has made an order for the admission of persons under the circumstances stated, for the purpose stated, or for any other purpose, to a person who happens to be in a weak state of health, and under alleged improper confinement. It appears to me, that this also is more properly a subject for the consideration of a court of equity. I am extremely unwilling that we should take upon ourselves to exercise a jurisdiction which the law does not vest in us, and without some precedent for it I think we ought not to interpose in this manner, because it is impossible for us to know to what extent we may not be required to exercise such an authority. Where the liberty of the person is restrained, there we interpose by *habeas corpus*; and if in this case it had been

satisfactorily proved to us that this lady's personal liberty was restrained, we should have had no discretion to exercise upon the subject, and should grant a writ at once.

THE KING
v.
MIDDLETON.

BAYLEY, J. :

[657]

I am of the same opinion. We cannot grant a writ of *habeas corpus* to do any more than remove that degree of restraint upon the person, which the law considers to be illegal. In this case a foundation must be laid to satisfy us that the husband is exercising an illegal restraint upon the person of his wife. For any thing that at present appears, he is only desirous of preventing any communication which may aggravate her present dangerous state of health. In all events, it appears that no good purpose can be answered by granting a *habeas corpus*, because she appears to be in a state of health which renders her unfit to be removed. In my opinion, neither of the cases cited is an authority for this motion. If this lady is prevented from disposing of her separate property, a court of equity is the proper tribunal for redress, and that court will enable her to dispose of her property as she thinks proper. The Court is in this difficulty, that they have an alternative motion presented for their consideration. It is clear that they cannot grant a *habeas corpus*, and then they are called upon to grant a rule to shew cause why certain persons should not have access to this lady. That is quite a novel application ; and I know of no instance in which it has been complied with by this Court. It may be said, perhaps, that a similar occasion never occurred. The reason of that probably is, that this subject has been always considered to be one which peculiarly belongs to a court of equity.

HOLROYD, J. :

This is not a case in which this Court would be justified in granting a *habeas corpus*, for it does not appear that this lady is under such restraint as would prevent her from exercising her personal liberty if she were in a fit state of health so to do. On the contrary, it appears that she is confined solely by ill health. Then if there be no illegal restraint, how *can we grant a

[*653]

THE KING *habeas corpus*? On the other hand, how can we grant a rule
 v. calling upon the husband to admit persons into his house, when
 MIDDLETON. he is not doing any thing illegal, though he refuses particular
 persons admission into his house, in order to do that which the
 wife has power to do by other means.

BEST, J. concurred.

Rule refused.

1819.
 Nov. 27.
 [700]

THE KING *v.* THE JUSTICES OF HEREFORDSHIRE
 AND THE COUNTY TREASURER OF THE SAME SHIRE.

(1 Chitty, 700—702.)

Quo warranto will not lie against a county treasurer to shew by what
 authority he holds the office, if he has been *de facto* elected by the
 justices in Quarter Sessions.

W. E. TAUNTON moved for a writ of *quo warranto*, to be
 directed to the county treasurer of Herefordshire, calling upon
 him to shew by what authority he held the office of county
 treasurer. This motion was founded upon a suggestion that the
 election of the said county treasurer was void, inasmuch as one
 of the Justices of the Peace, who voted at the election, had not
 at the time of the election duly qualified himself by taking the
 oath prescribed by 18 Geo. II. c. 20.

The Court immediately interposed, and said that a writ of *quo*
warranto would not lie in this case; and without some authority
 being cited for such a purpose, they could not now for the first
 time assume an authority which had not hitherto been exercised.
 They could grant a mandamus to the Justices in Sessions to
 *elect a county treasurer where the office was void, but it being
 stated at the Bar that there was a county treasurer elected *de*
facto, they could not call upon that person to shew by what
 authority he held the office.

[*701]

Writ refused.

* * * * *



INDEX.

ACCUMULATION. *See* Trust, 2.

ACTION—1. **Compromise of—Recovery of money paid.**—There is no remedy in equity for the recovery of money paid on compromise of an action, where the party had full knowledge of the facts, and the means of proving them at the trial. *Goodman v. Sayers* 112

— 2. **Founded upon equitable decree.**—An action at law is not maintainable upon a decree of a court of equity for a specific sum of money founded on equitable considerations only; and therefore, where a bill was filed for the specific performance of an agreement for the purchase of an estate, and the decree was for payment of interest on the purchase-money and costs: Held, that no action at law was maintainable to recover such interests and costs. *Carpenter v. Thornton* 299

— 3. **Release by one of several co-plaintiffs.** *See* Release, 1.

— 4. **Parties to.** *See* Practice, 1.

AGENT. *See* Principal and Agent.

ANNUITY, secured on Colonial revenues. *See* Will, 18.

APPEAL, from Quarter Sessions. *See* Jurisdiction.

APPRENTICE—**Avoidance of indenture on attaining majority—**
Liability of father on covenant for definite term of service.—Covenant upon an indenture of apprenticeship, by the master against the father; breach, that the apprentice absented himself from the service: plea, that the son faithfully served till he came of age, and that he then avoided the indenture: Held, that this was no answer to the action. *Cuming v. Hill* 305

ARBITRATION—1. **Action to set aside award.**—A bill will not lie to set aside an award on a question of fact referred to arbitration, except for corruption, partiality, or irregularity of conduct in the arbitrators.

On a bill to impeach an award, evidence of the merits is only to be received so far as it throws light on the conduct of the arbitrators.

It is irregular for two arbitrators to meet without notice to the third; but it is not a sufficient ground to set aside the award, when the substance was settled in his presence. *Semble. Goodman v. Sayers* 112

— 2. — The Court will not set aside an award on the ground that the arbitrators have decided contrary to law, unless the law be clear upon the subject. *Richardson v. Nourse* 368

— 3. **Arbitrator appointed by the Court—Revocation of authority.**—After an order of the Judge referring a cause to arbitration, the parties have no power to revoke the authority of the arbitrator. *Aston v. George* 803

ASSIGNMENT—Of dock dues—Mortgage of docks—Interest in land.—By the Acts of Parliament passed for building, improving, and

maintaining the Liverpool Docks, the corporation (who were trustees for the purpose of carrying the Acts into execution) were authorized to levy certain rates and duties on the ships and vessels entering and going out of the port of Liverpool: and they were empowered to borrow money for the maintenance of the docks, by sale (by auction) of assignments of the rates and duties so imposed on the shipping, securing to the purchasers 100*l.* each, with interest, till paid: Held, that such assignment was not a mere chattel but a charge upon the docks; and therefore an interest in land. *R. v. Winstanley* 743

AUCTIONEER, purchase by. *See* Vendor and Purchaser, 1.

BANKRUPTCY—1. Certificate as bar to action by a surety for loss through non-payment by bankrupt of original debt.—By the 49 Geo. III. c. 121, s. 8, the certificate of a bankrupt is a bar, not only to any action at the suit of the surety for the recovery of money paid in discharge of the original debt, but to any action for the consequential damage accruing from the non-payment by the bankrupt of the original debt, when due; and therefore, where the acceptor of an accommodation bill brought an action against the drawer, who had become bankrupt, for not providing him with funds to pay the bill when due, whereby he had incurred the costs of an action, and was obliged to sell an estate in order to raise money to pay the bill, the certificate was held to be a good bar. *Van Sandau v. Corsbie* 250

— 2. Property in possession, order, and disposition of bankrupt—Goods held by bankrupt as administrator.—Where a person entitled to take out letters of administration neglected to do so, but remained in possession of the goods of the intestate, and being so in possession, became a bankrupt, and a creditor of the intestate afterwards took out letters of administration, and claimed the goods from the assignees: Held, that these goods were property in the possession, order, and disposition of the bankrupt, with the consent of the true owner, and that the assignees were therefore entitled to them. *Fox v. Fisher* 324

— 3. Subsequent seizure by assignees of goods left by them in bankrupt's possession.—Where the assignees of an uncertificated bankrupt, by agreement, for a valuable consideration paid to them by a third person, had left the bankrupt's furniture, &c. in his possession, and afterwards, notwithstanding such agreement, seized the same, it was held, that they were justified in so doing, an uncertificated bankrupt not being entitled to retain any property against his assignees. *Nias v. Adamson* 360

BILL OF EXCHANGE—1. Acceptance by corporation not having statutory power to make contract not under seal. *Broughton v. Manchester Waterworks Co.* 278

— 2. Promissory note—Extrinsic evidence to shew intention of maker.—Where a promissory note on the face of it purported to be payable on demand, parol evidence is not admissible to shew, that at the time of making it, it was agreed that it should not be payable till after the decease of the maker. *Woodbridge v. Spooner* 365

And see Principal and Surety, 1.

CARRIER—Notice excluding liability for loss of valuable parcel—Negligence.—A carrier had given notice that he would not be answerable for parcels of value, unless entered and paid for as such; and the plaintiffs, with the knowledge of this, delivered a parcel, containing Bank notes to a large amount, without informing the carrier of its contents. The coach in which the parcel was conveyed, was left, at midnight, standing for some time in the middle of a very wide street, with a porter, who was ordered to

watch it; during this time the parcel was stolen. At the trial, the jury were asked whether the plaintiffs had been guilty of any unfair concealment, by not informing the carrier of the nature and value of the parcel, and whether the carrier had been guilty of gross negligence: Held, that the direction to the jury was right. *Batson v. Donovan* 399

CERTIORARI—Affidavit in support of.—The Court will not grant a *certiorari* on behalf of the defendant to remove an indictment from the sessions, on an affidavit that he was advised that difficult points of law might arise. But leave was given to renew the motion at chamber-, if a better affidavit could be obtained. *R. v. Harrison* 822

CHAPEL—Jurisdiction of Court to execute trusts of deed.—Jurisdiction for execution of a trust for supporting a dissenting meeting-house, difficult to exercise.

Pending a suit for the regulation of a dissenting meeting-house, the minister, if performing his duty, will in general be continued, whether duly appointed or not.

A dissenting meeting-house must continue devoted to the doctrines, originally agreed on at the foundation of the trust, though some of the congregation may change their opinions. *Foley v. Wontner* 110

CHARITY—1. Administration—Jurisdiction of Court.—In distributing the increased rents of a charity estate, the Court has authority to alter not only the proportions in which the objects of the charity would take under the original instruments, but also the objects themselves. *Att.-Gen. v. Mayor of Bristol* 136

— 2. Conveyance of copyholds to charitable uses.—A conveyance of copyhold lands to charitable uses, in the life-time of the party, is within 9 Geo. II. c. 36 [51 & 52 Vict. c. 42], and therefore must be made with the formalities required by that Act. The Court will not, even after a long and undisturbed enjoyment, presume a bargain and sale, and enrolment of the same in Chancery. *Doe d. Howson v. Wuterton* 328

— 3. Disposition of surplus income.—A corporation, to which a sum of money had been given for the purposes mentioned in the deed, and to the intent that it might be laid out in the purchase of lands of the clear yearly value of 120*l.* and more, covenant to pay thereout annual sums of nearly the same amount to certain charities in rotation; the corporation itself being one of those charities, there being no express gift of the surplus, and the decrease and subsequent increase of the rents being in certain events provided for: Held, that the other charities were not entitled to call for a distribution of the increased rents.

The rules prevailing for the construction of gifts to charitable uses, are to be considered only as furnishing *indicia* of the donor's intention. *Att.-Gen. v. Mayor of Bristol* 136

— 4. School—Appointment of master.—The master of a free school was appointed by the persons acting as trustees, and acted as a master for many years. Held: that if he has since his appointment, duly performed the duties of the office, the validity of his appointment cannot afterwards be questioned.

The master of a free grammar school is permitted to take boarders to be educated in the school, but not so as to prejudice the free scholars.

Several donations partly for the support of a school, and partly for the support of a grammar school, being devoted by the commissioners of charitable uses in 1623, to the maintenance of a grammar school, and that decree having since been followed, the whole revenues must be applied to the use of the grammar school, at least during the continuance of a master appointed under the present system.

Although in a charity case the proper relief may be granted, though not

prayed for, yet the state of the record is to be considered with reference to the question of costs.

There is no incompatibility in the offices of master of a free grammar school and vicar of the parish. *Att.-Gen. v. Hartley* 167

And see Will, 2, 3.

CITY OF LONDON—Election of Lord Mayor—Precedence over ordinary business.—On the charter day for the election of Lord Mayor of the city of London, the business of the election ought to have precedence of all other matters; and therefore it is not lawful, after the Lord Mayor and aldermen have retired from the hustings, to propose any other business inconsistent with the election, the discussion of which may have the effect of putting it off altogether. *R. v. Parkyns* 519

CLERK OF THE PEACE—Fees—Jurisdiction of sessions.—The sessions have no jurisdiction, under 55 Geo. III. c. 51, s. 16 (15 & 16 Vict. c. 81), to make a prospective order for a compensation thereafter to be made to the clerk of the peace; and, therefore, where a county-treasurer, in obedience to such an order, made the payment, and that payment was afterwards, by an order of Sessions, allowed in his accounts, the Court of K. B. quashed so much of the order of Sessions as allowed that item: Quære, whether the Sessions have a power to make any compensation to the clerk of the peace. *R. v. Williams* 352

COMMON—1. *Approvement*—Extent of custom.—A copyhold tenement, to which a right of common was annexed, having vested in the lord by forfeiture, he re-granted it as a copyhold, with the appurtenances: Held, that having always continued demisable, while in the hands of the lord, it was a customary tenement, and, as such, was still entitled to right of common: Held, secondly, that a custom for the lord to grant leases of the waste of the manor, without restriction, is bad in point of law. *Badger v. Ford* 331

— 2. *Disturbance of*.—In an action on the case for disturbance of common, where the right is alleged to be in respect of a messuage and land, it is not necessary for the plaintiff to prove the whole of such allegation; and where the plaintiff declared upon a right of common in respect of a messuage and one hundred and fifty acres of land, with the appurtenances: Held, that the declaration was divisible, and that proof of common right in respect of the land was enough to entitle him to a verdict *pro tanto*. *Ricketts v. Salwey* 800

COMPANY—1. *Action against co-director*.—On a bill by some directors of an insurance company, constituted by deed, against another director, alleging misconduct, the Court refused to continue an injunction, the plaintiffs not having made use of the powers of regulation given them by the deed. *Ellison v. Bignold* 203

— 2. *Acceptance of bill by*.—*Broughton v. Manchester Waterworks Co.* 278

CONFLICT OF LAWS—Suit by foreigner for injury to trade lawful in his own country, but unlawful by English law.—A foreigner who was not prohibited from carrying on the slave-trade by the laws of his own country, might, notwithstanding the Acts of Geo. III. relating to the slave-trade, recover, in a British court of justice, damages sustained by him in respect of the wrongful seizure, by a British subject, of a cargo of slaves on board of a ship then employed by him in carrying on the African slave-trade. *Madrazo v. Willes* 422

CONSTABLE—Mistake—Action not brought within six months—24 Geo. II. c. 44.—A constable acting under a warrant commanding him to

take the goods of A. takes the goods of B., believing them to belong to A. : Held, that he was entitled to the protection of the statute 24 Geo. II. c. 44, s. 8, and that an action against him must be brought within six calendar months. *Parton v. Williams* 414

CONTEMPT OF COURT. *See Injunction, 1.*

CONTRACT—1. **Agreement signed by one party only.**—A contract signed by one party only may be enforced by the other, since where a contract is signed by one party only, the other by filing a bill for a specific performance, makes it binding on himself. *Martin v. Mitchell* . . . 184

— 2. **Memorandum embodying terms of proposed agreement.**
See Landlord and Tenant, 3.

And see Specific Performance; Vendor and Purchaser.

COPYHOLD—**Surrender.**—Upon sales in Court the vendor will be compelled to surrender a copyhold in person, if it can be conveniently done. *Noel v. Weston* 235

And see Charity, 2; Common, 1.

COPYRIGHT—**Musical composition**—**Musical piece forming only part of book.**—Declaration that plaintiff was author of a book, being a musical composition called "Captain Wyke," is supported by shewing that the tune was only one of a collection of other tunes. An author does not forfeit his copyright by having sold manuscript copies of the work before it is printed and published. *White v. Geroch* 786

CORONER—**Inquest**—**Jury not sworn super visum corporis.**—A coroner's duty is judicial, and he can only take an inquest *super visum corporis*; and an inquest, in which the jury were not sworn by the coroner himself, and *super visum corporis*, is absolutely void. The Court will not, therefore, after an adjournment by the coroner of such an inquest, grant any mandamus to compel him to proceed in it. *R. v. Ferrand* . . . 373

CORPORATION. *See Company.*

COURT OF INQUIRY. *See Evidence, 3.*

COVENANT, in articles of partnership, breach of. *See Partnership, 2.*

And see Apprentices.

COUNTY—**Clerk of the Peace**—**Order of Sessions as to fees**—**Jurisdiction.** *See Clerk of the Peace.*

CRIMINAL LAW—1. **Criminal information**—**Motion for.**—The motion for a criminal information must be made by the law officers of the Crown, or a barrister, and not by a private individual. *R. v. Justices of Lancashire* 823

— 2. **Blasphemy.** *See Defamation, 1, 2.*

— 3. **Criminal conspiracy.** *See Evidence, 7.*

CROWN, grant by. *See Grant; Tithe.*

DEBENTURE. *See Assignment.*

DEED OF ARRANGEMENT. *See* Injunction, 3.

DEFAMATION—1. **Blasphemous libel.**—The statute 9 & 10 Will. III. c. 32, has not altered the common law as to the offence of blasphemy, but has given a cumulative punishment. It is, therefore, still an offence at the common law to publish a blasphemous libel. *R. v. Carlile* . . . 333

— 2. — It is not lawful to publish even a correct account of the proceedings in a court of justice, if such an account contain matter of a scandalous, blasphemous, or indecent nature. *R. v. Mary Carlile* . . . 338

— 3. **Charge of callous conduct.**—An action lies for a libel, stating that although plaintiff was aware of the death of a person occasioned by his improperly driving a carriage against that in which the person was driving, he attended a public ball in the evening of the same day. *Churchill v. Hunt* 807

— 4. **Declaration setting out words "in substance."**—Declaration stated that the defendant published a libel, containing false and scandalous matters concerning the plaintiff, *in substance* as follows; and then set out the libel with innuendoes: Held, that this was bad in arrest of judgment. *Wright v. Clements* . . . 465

— 5. **Presumption of publication of libel.**—On an information for writing, composing, and publishing a libel in the county of L., it appeared that the defendant, on the 22nd August, wrote and composed the libel in L., and that he was seen in L. on that and the following day. On the 24th, the libel was delivered in the county of M. (100 miles off) by A. to B., being inclosed in an envelope addressed to A., containing written directions to A. to forward the libel to B., by whom it was subsequently published in M. The envelope was open; and it was not proved that there was on it any trace of a seal or post-mark. A. was not called at the trial as a witness by either party; nor was it proved that he was a resident, or had been about that time in L.: Held, that this was evidence on which the jury might properly be left to presume that the libel was delivered open to A. in L.

Held, also, that a delivery at the post-office in L. of a sealed letter, inclosing a libel, is a publication of the libel in L. Held, also, where a defendant writes and composes a libel in L. with the intent to publish, and afterwards publishes it in M., that he may be indicted for a misdemeanour in either county. *R. v. Burdett* . . . 539

— 6. **Presumption of intention of person publishing libel.**—**Summing-up of Judge.**—Held, also, where, in summing up, the Judge told the jury that the intention was to be collected from the paper itself, unless explained by the mode of publication or other circumstances; and that, if its contents were likely to excite sedition, &c., defendant must be presumed to intend that which his act was likely to produce; and that, if they found such to be the intent, he was of opinion it was a libel; and that they were to take the law from him, unless they were satisfied that he was wrong: that this was a correct mode of leaving the question to the jury under 32 Geo. III. c. 60, s. 1. *Ibid.*

— 7. **Imputation of crime.**—Where a libel imputes to others the commission of a triable crime: Held, that evidence of the truth of it is inadmissible [see now 6 & 7 Vict. c. 96, s. 6]. *Ibid.*

— 8. **Report of judicial proceedings.**—**Addition of libellous heading.**—Declaration for a libel concerning the plaintiff in his profession as an attorney. The libel began, "Shameful conduct of an attorney," and then proceeded to give an account of proceedings in a court of law, which contained matter injurious to the plaintiff's professional character. The defendant pleaded that the supposed libel contained a true account of the proceedings in the court of law: Held, that the plea was bad, inasmuch as the words "Shameful conduct of an Attorney" formed no part of the proceedings in the court of law.

Quere, Whether it be lawful to publish proceedings of a court of law containing matter defamatory of a person neither a party to the suit nor present at the time of the enquiry. *Lewis v. Clement* 530

DISCLAIMER.—*See Estate.*

DISTRESS—For rent—Seizure of growing crops.—A tenant, whose standing corn and growing crops have been seized as a distress for rent before they were ripe, cannot maintain an action upon the case under 2 W. & M. sess. 1, c. 5, against the landlord or his bailiffs for selling the same before five days, or a reasonable time, have elapsed after the seizure, such sale being wholly void. *Owen v. Legh* 455

DOCK—Assignment of dues as security for advances—Interest in land. *See Assignment.*

ECCELESIASTICAL LAW—Jurisdiction of Ecclesiastical Court.—The Ecclesiastical Court has jurisdiction, *ratione loci*, over the order and proceedings of vestry meetings, held in a church; and therefore where a rector had libelled in that court a parishioner, for preventing him from presiding as chairman at a vestry meeting, a prohibition was refused. *Wilson v. McMath* 371

EJECTMENT—*Scire facias*—Lapse of time.—Where an ejectment had been brought and judgment recovered in 1798, and the term of the demise laid in the declaration had since expired, the Court refused to grant a rule for enlarging the term and issuing a *scire facias*, the possession having changed, and the person who was the owner having since died. A writ of possession cannot issue at the distance of 20 years after judgment, without a *scire facias*, to be obtained on motion. *Doe v. Rendell* 816

— 2. Service of writ in action of. *See Practice*, 6.

ESCHEAT.—A. and B. join in a petition to the Crown, representing an estate to have escheated, and procure a grant of it to be made to them: Held, that A. could not afterwards set up a claim to one part under a prior title in himself, while taking the benefit of the grant as to the rest. *Cumming v. Forrester* 157

ESTATE—Disclaimer by devisees.—A devisee in fee may by deed, without matter of record, disclaim the estate devised. *Tounson v. Tickell* 291

EVIDENCE—1. Documentary—Entry in Corporation books.—An entry in the public books of a corporation, is not evidence for them, unless it be an entry of a public nature. *Marriage v. Lawrence* 326

— 2. London Gazette.—The “Gazette” is sufficient evidence of a proclamation issued under an Order in Council: because it is a public act, regarding the Crown and Government, and must pass the Great Seal before it can be admitted into the “Gazette.” *Attorney-General v. Theakstone* 716

— 3. Privileged communication.—In an action by one military officer (for libel) against another,—who, as President of a Court of Inquiry composed of military officers, held under the directions of the Commander-in-Chief of the Forces, for the purpose of investigating the doubtful conduct of the plaintiff, and to determine whether it were a fit subject for a court-martial—delivered in person to the Commander-in-Chief, a transcript of the minutes of the proceedings, evidence, and judgment of the Court, in the form of an official report containing the alleged libellous matter; the Chief Justice of the King’s Bench refused to permit the report, or a copy of it

obtained from the office of the Commander-in-Chief, the regular place of deposit for such documents, to be given in evidence on the part of the plaintiff: Held, by the Court of Error, that such evidence was rightly excluded; because the interests of the State require that such documents should be kept inviolably secret, and that their disclosure, by production as evidence in courts of law, should not be compellable by a party, or allowable by the Judge—not on any consideration merely affecting the rights of the parties, but because it is his duty judicially to exclude, as guardian of the public good, all such matters as might tend to injure the general welfare—lest political secrets might be thereby betrayed to the injury of the State.

Semble, military Courts of Inquiry, constituted and held as in this case, are not illegal, nor contrary to the provisions of the Mutiny Act. *Home v. Bentinck*, 748; *Anderson v. Hamilton* 751 n.

EVIDENCE—4. Secondary evidence of contents of document.—In 1813, a fire occurred on the plaintiff's premises, insured with the E. Insurance Company, and the company settled the loss. In 1819, an action was tried for an alleged libel charging the plaintiff with having defrauded the insurance company. At the trial the plaintiff called the company's agent, who stated that the policy was returned to him after the fire, and that he had it in possession then, and afterwards, when the plaintiff made a larger insurance with the company; that upon the loss having been settled, the old policy became a useless paper; that he did not know what had become of it, but he believed he had returned it to the plaintiff. The clerk to the plaintiff's attorney then proved, that within a few days of the trial, he went to plaintiff's house to search for the policy, when the plaintiff shewed every drawer where he usually kept his papers; that he examined such drawers, and every other place where he thought it likely to find such a paper, without finding it: Held, that this was sufficient to entitle the plaintiff to give secondary evidence of the contents of the policy. *Brewster v. Sewell* 395

— **5. Lost unstamped agreement—Parol evidence of contents.**—An agreement in writing, unstamped, for letting a tenement at a certain rent, having been lost: Held, that parol evidence of its contents was not admissible, for the sake of proving thereby the value of the tenement. *R. v. The Inhabitants of Castle Morton* 493

— **6. Unstamped and unsigned memorandum of sale—Secondary evidence of contract.**—Defendants were sued for the price of some growing trees, which they had purchased, cut down, and carried away; a witness proved an admission by one of them that something was due, and a promise to pay. At the time of the bargain written memoranda had been made of the transaction; but these memoranda (one of them an item in a book of accounts) being neither stamped nor signed with the names of the parties, were not produced in evidence, and the plaintiff was nonsuited: Held, that the nonsuit was proper. *Teal v. Auty* 656

— **7. Unlawful assembly—Evidence of objects of meeting.**—Upon an indictment against A. B. and others, for unlawfully meeting together with persons unknown, for the purpose of exciting discontent and disaffection, it was held, (A. B. having presided at this meeting,) that resolutions passed at a former meeting assembled a short time before, in a distant place, and at which A. B. also presided, and the avowed object of which meeting was that of the meeting mentioned in the indictment, were admissible in evidence to shew the intention of A. B. in assembling and attending the meeting in question.

A copy of these resolutions, delivered by A. B. to the witness at the time of the former meeting, as the resolutions then intended to be proposed, and which corresponded with those which the witness heard read from a written paper, is admissible without producing the original.

Large bodies of men having come to this meeting from a distance, marching in regular order, resembling a military march, it was held to be admissible evidence to shew the character and intention of the meeting, that within two days of the same, considerable numbers were seen training and drilling before day-break, at a place from which one of these bodies had come to the meeting; and that on their discovering the persons who saw them, they ill-treated them, and forced one of them to take an oath never to be a King's man again: Held, also, that it was admissible to shew in evidence, for the same purpose, that another body of men in their progress to the meeting, on passing the house of the person who had been so ill-treated, expressed their disapprobation of his conduct by hissing.

Parol evidence of inscriptions and devices on banners and flags displayed at a meeting, is admissible, without producing the originals.

Upon such an indictment, evidence of the supposed misconduct of those who dispersed the meeting is not admissible. *R. v. Hunt* . . . 485

EVIDENCE—8. Parol—Of conspiracy.—On a prosecution for a crime, the proof whereof is supposed to consist wholly or in part of evidence of a conspiracy entered into by the party then indicted, and under trial, so that the conspiracy is to be given in evidence against him,—general evidence of the existence of the conspiracy charged may be received in the first instance, though it cannot affect such defendant, unless brought home to him or to an agent employed by him.

The same rule applies if a defendant seeks by such general evidence, in the first instance, to affect the prosecutor with a conspiracy to suborn witnesses for the destruction of his defence, provided the proposed evidence be previously opened to the Court, as in the case of a prosecution to be proved by conspiracy. *The Queen's Case* . . . 678

— 9. **Question to witness as to belief in oath.**—If a witness, without objecting to it, takes the oath in the usual form, he may be afterwards asked, whether he thinks the oath binding upon his conscience; but it is unnecessary and irrelevant to ask him, if he considers any other form of oath more binding, and such question cannot be asked. *Ibid.* . . . 662

— 10. **Examination and cross-examination of witnesses—Statements elicited in cross-examination concerning person not examined as a witness.**—If, on the trial of an indictment for any crime, evidence has been given upon the cross-examination of witnesses examined in chief in support of the indictment, from which it appears that A. B. (not examined as a witness) has been employed by the prosecutor as an agent to procure and examine evidence and witnesses in support of the indictment, the party indicted is not permitted to examine C. D. as a witness to prove that A. B. has offered a bribe to E. F. in order to induce him to give testimony touching the matter in the indictment (E. F. not being a witness examined in support of the indictment, nor examined before it was so proposed to examine C. D.). *Ibid.* . . . 678

— 11. — **Evidence to contradict witness.**—If a witness examined in chief on the part of the plaintiff, being asked whether he remembers a quarrel taking place between A. and B., answers, that he has heard of a quarrel between them, but does not know the cause of it, and the witness is not asked, upon his cross-examination, whether he has or has not made a declaration stated in the question touching the cause of the quarrel, the counsel for the defendant cannot, in order to prove the witness's knowledge of the cause of the quarrel, afterwards examine another witness to prove that the first witness has made such a declaration to him touching the cause of the quarrel.

If a witness examined in chief on the part of the plaintiff, being asked whether he remembers a quarrel taking place between A. and B., answers, that he does not remember it, and the witness is not asked, on his cross-examination, whether he has or has not made a declaration stated in the

question respecting the quarrel, the counsel for the defendant cannot, in order to prove that the witness must remember the quarrel, afterwards examine another witness to prove that the first witness has made such a declaration. *Ibid.* 675

EVIDENCE—12. Examination and cross-examination of witnesses—Authorship of letter—Letter must be shewn to witness.—It is not allowable, on cross-examination, in the statement of a question to a witness, to represent the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect, without having first shewn the witness the letter, and having asked him whether he wrote that letter. [But see now 28 & 29 Vict. c. 18, s. 5.]

Two or three lines of a letter may be exhibited to a witness, without exhibiting to him the whole, and the witness may be asked whether he wrote the part exhibited. But, if the witness deny that he wrote that part, he cannot be examined as to the contents of the letter. *Ibid.* 664

— 13. — **Admission as to authorship of letter—Evidence of contents.**—If, on cross-examination, a witness admits a letter to be of his handwriting, he cannot be questioned by counsel whether statements, such as the counsel may suggest, are contained in it, but the whole letter must be read in evidence.

In the ordinary course of proceeding, the letter must be read as part of the cross-examining counsel's case. The Court, however, may permit it to be read at an earlier period, if the counsel suggest that he wishes to have the letter immediately read, in order to found certain questions upon it, considering it, however, as part of the evidence of the counsel proposing such a course, and subject to the consequences thereof. *Ibid.* 666

— 14. — **Particular representations—Necessity of stating whether representations were parol or written.**—If, on cross-examination, it is proposed to ascertain of a witness whether he has made representations of any particular nature, immediately after being asked whether he made any representation he must be asked whether he made the representation by parol or in writing. *Ibid.* 669

— 15. — **Re-examination as to conversation admitted in cross-examination.**—If, on the trial of an action or indictment, a witness examined on the part of the plaintiff or prosecutor, upon cross-examination by defendant's counsel, states that at a time specified he told A. that he was one of the witnesses against the defendant, and being re-examined by the plaintiff's or prosecutor's counsel, states what induced him to mention this to A., the plaintiff's or prosecutor's counsel cannot further re-examine the witness as to the conversation, even as far only as it related to his being one of the witnesses. *Ibid.* 671

— 16. — **To substantiate rebuttal of statements as to which the witness has not been previously examined or cross-examined or subsequently recalled.**—When a witness in support of a prosecution has been examined in chief, and has not been asked in cross-examination as to any declarations made by him, or acts done by him, to procure persons corruptly to give evidence in support of the prosecution, it is not competent to the party accused to examine witnesses in his defence to prove the declarations or acts, without first calling back the witness examined in chief to be examined or cross-examined as to the fact, whether he ever made the declarations or did the acts. *Ibid.* 685

— 17. **Confidential communication.** See *Solicitor and Client*, 1.
And see *Bill of Exchange*, 2.

EXCHEQUER BILL. See *Trover and Conversion*.

EXECUTION—Refusal of sheriff to deduct rent after notice from

landlord.—Under the statute of the 8 Anne, c. 14, the sheriff is bound to retain one year's rent out of the proceeds of a tenant's goods taken in execution, provided he has notice of the landlord's claim at any time while the goods or the proceeds remain in his hands; and the Court, upon motion, ordered the same to be paid to the landlord, even where the notice was given after the removal of the goods from the premises. *Arnitt v. Garnett* . . . 453

EXECUTOR—1. **Recovery of money lent by one executor**—Joiner of co-executor.—One of two executors having alone proved the will, had received a debt due to the testator, which by his will was appropriated to the payment of specific legacies to his grandchildren, with interest thereon, and afterwards permitted the money to be lent out to a third person, by whom it was paid to A. A. on being applied to by the executor, acknowledged that he had received the money, and that it belonged to the testator's grandchildren, but refused to pay it over to the executor: Held, that both executors might join in an action brought to recover the money against A. *Webster v. Spencer* . . . 427

— 2. **Lending money on personal security.**—It does not amount to a devastavit, if an executor lends out on private security money belonging to the testator, but not wanted for the immediate uses of the will, provided he exercises a fair and reasonable discretion on the subject. *Ibid.*

EXTENT—1. **Right of Crown debtor to sue his debtor.**—An extent at the suit of the Crown against the debtor of its debtor has not, before inquisition taken, the effect of divesting the Crown debtor's right to sue his debtor, or to receive the debt. *Lakemun v. M'Adam* . . . 774

— 2. **Sheriff's claim for poundage.**—Sheriffs are not entitled to poundage on money in the Crown debtor's possession, seized under an extent against him: Nor on money paid by the sureties of a Crown debtor who has been arrested on the Crown process, in order to obtain the release of his person.

Sheriffs have no authority under the extent, as sheriffs, to collect debts due to the Crown debtor; and if they receive such debts, they cannot make it the ground of a charge for poundage on the amount. *R. v. Villers* . 778

FACTOR—Authority of. *See* Principal and Agent.

FRAUD—Constructive. *See* Power, 2.

FRAUDS, STATUTE OF. *See* Sale of Goods, 2.

GAME—Colourable qualification to kill. *See* Voluntary Conveyance.

GAMING—Recovery of money lent for purpose of illegal Stock Exchange speculation. *Cannan v. Bryce* . . . 342

GOODS, SALE OF. *See* Sale of Goods.

GRANT—1. **By Crown**—A Crown grant made under a mistake may be recalled irrespectively of any derivative title dependent upon it. Hence it seems that such a grant could not effectually raise a question of election: but a person applying for and claiming under such a grant cannot (so long as the grant remains) dispute its application as to part of the property comprised therein to the prejudice of others who claim thereunder. *Cumming v. Forrester* . . . 157

— 2. **Of extra-parochial lands, whether passing tithe.** *See* Tithe.

GUARANTY—1. Continuing guaranty—A guaranty of the payment of A. B. to the extent of 60*l.* at quarterly account, bill two months, for goods to be purchased by him of the plaintiff, is not a continuing or standing guaranty to that extent for goods to be at any time supplied to A. B. until the credit is recalled. *Melville v. Hayden* 495

— 2. Undertaking by solicitors to pay rent—personal liability.—The solicitors of the assignees of a bankrupt tenant, upon whose lands a distress had been put by the landlord, gave the following written undertaking: "We, as solicitors to the assignees, undertake to pay to the landlord his rent, provided it do not exceed the value of the effects distrained:" Held, they were personally liable. *Burrell v. Jones* . . . 296

HABEAS CORPUS—1. The Court will not grant a *habeas corpus* on the ground of an alleged restraint which does not illegally interfere with personal liberty. *R. v. Middleton* 826

— 2. Whether grantable of course.—The writ of *habeas corpus* at common law, although a writ of right, is not grantable of course, but only on motion in Term time, stating a probable cause for the application, and verified by affidavit: Quære, whether under the statute 31 Car. II. c. 2, which only applies to cases where the application is made to a Judge in vacation, the writ be grantable of course. *Hobhouse's Case* 443

— 3. To bring up infant, at suit of father. See *Infant*.

HORSE, SALE OF. See *Sale of Goods*, 2.

HUSBAND AND WIFE—Husband's liability for payment of wife's funeral expenses.—Quære, whether a husband has a right to throw his wife's funeral expenses upon her separate estate. *Gregory v. Lockyer* 246

And see *Specific Performance*.

INFANT—*Habeas corpus*—at suit of father.—The Court will grant a *habeas corpus* in the first instance, to bring up an infant, who had absconded from his father, and was detained by a third person without his consent. *In re Pearson* 690

INJUNCTION—1. Committal for breach of.—Defendant committed for breach of an injunction after notice of its having been obtained, although the order for the injunction had not been served. *Vansandau v. Rose* . . 114

— 2. To restrain sailing of ship.—Injunction to restrain the sailing of a vessel, containing goods sold to a person who had become insolvent, but over which the plaintiff retained a right of stoppage *in transitu*, refused, on the ground of the possible injury to other persons interested in other goods on the same vessel. *Goodhart v. Lowe* 164

— 3. Similar suits in England and Ireland.—Trustees for creditors, after a decree for the execution of the trusts, restrained from proceeding in a suit in Ireland, having the same objects. *Harrison v. Gurney* . . . 211

And see *Partnership*, 2.

INN—1. "Tavern and coffee house."—A house of public entertainment in London, where beds, provisions, &c. are furnished for all persons paying for the same, but which is merely called a tavern and coffee-house, and is not frequented by stage coaches and waggons from the country, and which has no stables belonging to it, is an inn. *Thompson v. Lacy*. 385

— 2. Lien of innkeeper.—The owner of such a house is subject to the liabilities of innkeepers, and has a lien on the goods of his guest for the payment of his bill, even where the guest did not appear to have been a traveller. *Ibid.*

INQUEST. See *Coroner*.

INSURANCE (MARINE)—1. **Averment of interest**—"Any port or ports in the Baltic"—Licence to trade.—An averment in a declaration on a policy of insurance that A. B. C. D. and certain persons trading under the firm of Messrs. E. and F. & Co. were interested in the property is a sufficient statement of the interest for the purposes of pleading; and it is sufficient at the trial to prove that there is such a firm as Messrs. E. and F. & Co. without proving the names of the persons who compose the firm. A policy "to any port or ports in the Baltic" is legal, although some of those ports were then in a state of war with this country, and although no licence has been obtained, provided the ship was not sailing to such hostile port. *Wright v. Welbie* 792

— 2. **Deviation**.—Policy of insurance from P. to N. Y., with leave to call at any of the W. and L. islands on the passage, and to discharge, exchange, and take on board the whole or any part of any cargo at any ports or places, particularly at all or any of the W. and L. islands, without being deemed any deviation: Held, on this policy, the ship having proceeded to two of the L. islands for a purpose wholly unconnected with the voyage, that it was a deviation, and vitiated the insurance. *Hammond v. Reid* . . . 629

— 3. **"Jettison"**—Throwing cargo overboard to prevent capture.—The captain of a Spanish ship, in order to prevent a quantity of dollars from falling into the hands of an enemy, by whom he was about to be attacked, threw the same into the sea, and was immediately afterwards captured: Held, in an action upon a policy of insurance upon Spanish property, subscribed by British underwriters, who, at the time of effecting the policy, knew that the assured were Spaniards, and that Spain was at war with the state to whom the capturing vessel belonged, that this was a loss by jettison, that term, in a policy of insurance, signifying any throwing overboard of the cargo for a justifiable cause; secondly, that it was a loss by enemies; and thirdly, if not by jettison, in the strictest sense, that it was something of the same kind, and therefore came within the words "all other losses and misfortunes." *Buller v. Wildman* 435

— 4. **Misrepresentation of material fact**.—Agents of the owners of a ship, by a letter, saying, "The *Brilliant* will sail from Nassau for Clyde on the 1st of May, a running ship," instruct their correspondents to effect an insurance on the ship, which is done accordingly by them, shewing this letter to the underwriters. There being a favourable opportunity of convoy, the ship sailed on the 23rd of April. On the 11th of May she was captured: Held, that the expression of the letter was positive, and not the statement of an expectation; and that the exhibition of the letter being a representation material to the risk covered by the policy, which was not true in fact or in the event, vitiated the policy. *Dennistoun v. Lillie* 13

JURISDICTION—1. **Of K. B. over decision of Quarter Sessions**.—The Court of K. B. has no jurisdiction to review the judgment of the Quarter Sessions, except on a case sent up for their consideration; and, therefore, where the Sessions, having heard the witnesses on one side, had refused to hear those on the other side in an appeal, on the ground that their testimony had been prefaced by observations on the part of the advocate contrary to their usual practice, the Court refused to grant a mandamus to rehear the appeal. *R. v. The Justices of Carnarvon* 636

— 2. **Of Ecclesiastical Court**. See *Ecclesiastical Law*.

JUSTICE OF THE PEACE. See *Magistrate*.

LANDLORD AND TENANT—1. **Charity lease**—Power of Warden and poor of hospital to bind their successors.—A lease by the warden and poor of an hospital, under the corporation seal, made before the expiration of a former lease, to a lessee, who then had only a part interest in the

first lease, but to whom the entire interest was assigned within three years afterwards, is binding upon the succeeding warden and poor of the hospital. *Grumbrell v. Roper* 533

LANDLORD AND TENANT—2. Fixture—Conservatory.—A conservatory erected by tenant for years (who had a remainder for life, after the death of his lessor) on a brick foundation, attached to a dwelling-house, and communicating with it by windows opening into the conservatory and a fine passing into the parlour chimney, becomes part of the freehold, and cannot be removed by the tenant or his assignees. *Buckland v. Butterfield* . . . 649

— **3. Memorandum embodying terms of tenancy—Intention to sign formal agreement.**—Where, upon the letting of premises to a tenant, a memorandum of agreement was drawn up, the terms of which were read over and assented to by him, and it was then agreed that he should, on a future day, bring a surety and sign the agreement, neither of which he ever did: Held, that the memorandum was not an agreement, but a mere unaccepted proposal, and that the terms of the letting, therefore, might be proved by parol evidence. *Doe d. Bingham v. Cartwright* 413

— **4. Renewal of lease—Expenses of renewal.**—A tenant for life of a hospital lease settled by will was thereby directed to lay by, out of rents and profits, for the purpose of paying the fine on renewals. On application for renewal by the tenant for life an exorbitant fine was claimed, and on further application by him a renewal was positively refused. The tenant for life having died, the remainderman renewed: Held, that the estate of the tenant for life must contribute towards the expense of the renewal. *Colegrave v. Manby* 245

— **5. Proof of terms of tenancy—Lost unstamped agreement.**
See Evidence, 5.

And see Distress; Guaranty, 2; Practice; Sheriff.

LIEN, of Innkeeper.—*See Inn, 2.*

And see Partition.

LIMITATIONS, STATUTE OF—1. Acknowledgment by mortgagee in possession.—Acknowledgment of mortgage title by a letter referring to a previous agreement under which the mortgagee claimed to be entitled to a release of the equity of redemption. *Hodde v. Healey* 270

— **2. Action for breach of contract—Occurrence of damage within six years.**—Where A., under a contract to deliver spring wheat had delivered to B. winter wheat, and B., having again sold the same as spring wheat had, in consequence, been compelled, after a suit in Scotland which lasted many years, to pay damages to the buyer, and afterwards B. brought an action of assumpsit against A. for his breach of contract, alleging as special damage, the damages so recovered: Held, that although the special damage was ascertained within six years before the commencement of the action by B. against A., yet that the breach of contract, which, in assumpsit, was the gist of the action, having occurred and become known to B. more than six years before that period, A. might properly plead *actio non accrevit infra sex annos*. *Battley v. Faulkner* 390

— **3. Negligence happening more than six years before bringing of action—Discovery within six years.**—Declaration in assumpsit stated as a breach, that the defendant did not diligently and sufficiently make a search at the Bank of England to ascertain whether certain stock was standing in the names of certain persons, the defendant having been employed as a solicitor so to do. The omission to search took place more than six years before action brought, although it was not discovered by the

plaintiff till within the six years. Held: that the Statute of Limitations having been pleaded, the plaintiff was not entitled to recover.

On the discovery being made, the defendant said the neglect arose from the omission of his clerk, and that he was responsible: Held, that such an acknowledgment was not sufficient. *Short v. M^cCarthy* . . . 503

And see **Mortgage**, 3.

LONDON GAZETTE.—The "Gazette" is sufficient evidence of a proclamation issued under an order in council. *Attorney-General v. Theakstone* 716

LORD MAYOR, election of. See **City of London**.

MAGISTRATE—1. **Refusal to act out of own district**.—Where a criminal information is applied for against a magistrate, the question for the Court is not whether the act done be found on investigation to be strictly right or not, but whether it proceeded from an unjust, oppressive, or corrupt motive (amongst which fear and favour are generally included), or from mistake or error only. In the latter case, the Court will not grant the rule. *R. v. Borron* . . . 447

— 2. **Right of solicitor to appear before magistrate**.—In the investigation of a charge of felony before a magistrate, a solicitor is only as a matter of courtesy permitted, but has no right to be present; nor can he comment on the evidence so as to apply the law to it, unless he be requested by the magistrate to give his opinion and advice upon the case. *Ibid.*

— 3. **Warrant granted by unqualified justice**.—The acts of a justice of the peace, who has not duly qualified, are not absolutely void; and therefore, persons seizing goods under a warrant of distress, signed by a justice who had not taken the oaths at the General Sessions, nor delivered in the certificate required, are not trespassers. *Margate Pier Co. v. Hannam* . 378

MANDAMUS—1. **Defect in writ**.—A writ of mandamus to a corporation, commanding them to pay a poor's rate, omitted to state that the defendants had no effects upon which a distress could be levied: Held, that this was a fatal objection to the writ, and might be taken after the return, or at any time before the issuing of the peremptory mandamus. Quære, whether, in such a case, a mandamus will lie. *R. v. The Margate Pier Co.* . 356

— 2. **To compel Quarter Sessions to give reasons for their judgments**.—This Court has no authority to compel the Quarter Sessions by mandamus to give their reasons for their judgments, or make any special entries upon their records; and the rule for a mandamus was discharged with costs. *R. v. The Justices of Devon* . . . 789

— 3. **To rehear appeal from Quarter Sessions**. See **Jurisdiction**.

MERGER.—1. A mortgage term was created in 1720, for one thousand years. The executors of the mortgagee took an assignment of another mortgage term on the same premises, created in 1725, for five hundred years, and assigned both the terms to the trustees of a lady who was entitled to them, under the mortgagee's will: Held, that the term for one thousand years was merged in the reversionary term for five hundred years. *Stephens v. Bridges* . . . 242

— 2. An equitable estate tail in a copyhold does not merge by the accession of the legal fee. *Merest v. James* . . . 253

MILITARY COURT OF INQUIRY—Evidence. See **Evidence**, 3.

MINE. See **Mortgage**, 2.

MONEY LENT—For purpose of illegal Stock Exchange speculation.—Money lent, and applied by the borrower for the express purpose of settling losses on illegal stock-jobbing transactions, to which the lender was no party, cannot be recovered back by him. *Cannan v. Bryce* . . . 342

MORTGAGE—1. **Loss of deeds by mortgagee—Reconveyance and indemnity.**—Upon a bill of foreclosure, the mortgagee having been robbed of the title-deeds, payment of the mortgage money within a limited time was decreed, and on payment of the same a reconveyance was directed, with a bond of indemnity against any possible claim under the lost mortgage deed. *Shelmardine v. Harrop* . . . 232

— 2. **Mine—Mortgagee in possession—Appointment of receiver.**—Motion by mortgagor for the appointment of a receiver of mines. The mortgagees were in possession, and one of them had become a partner by purchasing shares in the mines. The motion, which was made upon the ground of mismanagement, and excluding the mortgagor from interference, was refused; the parties having regulated their rights by subsequent agreement, and the mortgagee not admitting that his mortgage was satisfied.

A mortgagee in possession of mines is not bound to expend more than a prudent owner would spend.

If he can be deprived of the possession on the ground of mismanagement, it must be of a clear and specified nature.

On a motion for a receiver against a mortgagee, insisting by answer that he has not been fully paid, the Court will not try, by affidavits, the question whether any balance is due to him or not. *Rowe v. Wood* . . . 208

— 3. **Relative positions and rights of mortgagor and mortgagee.**—The position that the mortgagee is a trustee for the mortgagor, must be received with considerable qualifications.

Acts done by a trustee or termor for years, cannot have the effect of adverse possession. But the rule does not apply to the case of mortgagor and mortgagee.

A mortgagee in possession, keeping no account, and making no acknowledgment, becomes owner of the estate after the lapse of twenty years. *Cholmondeley v. Clinton* . . . 84

— 4. **Several incumbrancers—Outstanding legal estate—Priority.**—The covenant by B. (who has the legal estate in property in which A. is a beneficiary) to stand seised for the purpose of securing a debt due by A. to C., does not give C. an equivalent to the legal estate, so as to give C. a priority over another creditor, D., who has an equity prior in date, and in other respects equal, to that of C. *Frere v. Moore* . . . 759

— 5. **Foreclosure—Form of decree.** *Beckett v. Micklethwaite* . . . 274

— 6. **Right to redeem—Acknowledgment by mortgagee in possession.** See *Limitations, Statute of*, 1.

NEGLIGENCE of Solicitor. See *Limitations, Statute of*, 3 *Solicitor and Client*, 7, 8.

And see *Practice*, 7.

NUISANCE—Spring gun—Notice a bar to action at common law.—A trespasser, having knowledge that there were spring-guns in a wood, although he was ignorant of the particular spots where they were placed, could not maintain an action for an injury received in consequence of his accidentally treading on the latent wire communicating with the gun, and thereby letting it off. *Hott v. Wilkes* . . . 400

OATH—Witness's belief in. See *Evidence*, 9.

PARTITION—Expenditure on improvements—Account.—Where it is stated by the answer to a bill filed for a partition, that the defendant has

laid out money in building and improving the premises, the Court will not decree a partition, without a reference to the Master to take an account.

Money laid out in improving the premises, does not, however, in strictness, create a lien on the premises, but it is a sufficient ground for a court of equity to refuse to interfere. *Swan v. Swan* 770

PARTNERSHIP—1. **Assignment of interest.**—A partner may give to a third person interest in his share, but cannot make him a partner. *Bray v. Fromont* 224

— 2. **Breach of covenant in articles—Injunction.**—An injunction will not be granted to restrain the breach of a covenant in articles of partnership where the bill does not pray a dissolution of the partnership. *Marshall v. Colman* 116

— 3. **Dissolution of partnership—Assumption of debt by one partner.**—On the dissolution of a partnership a creditor who treats the continuing partners or partner as his debtors, does not necessarily abandon his right to resort to a retired partner for payment. *Lodge v. Ducas* 497

— 4. **Liability of retiring partner of bank for balance due to customer at date of dissolution—Appropriation of payments.**—The plaintiff carried on dealings in one general and unbroken account with A., one of the defendants, as his banker and army agent, from a period before 1807 up to 1819, when A. became bankrupt, and a balance was struck, none having been before struck since 1816. In 1807 defendant B. became a partner with A., and continued so till 1817, but the partnership was secret, and unknown to plaintiff till A.'s bankruptcy, defendant B. never interfering (to the knowledge of plaintiff) in the business carried on by A.; at the expiration of the partnership in 1817 a balance was due from defendants to plaintiff; between the expiration of the partnership and A.'s bankruptcy, A. paid to plaintiff, and also received from plaintiff, several sums. In an action against the defendants for the balance due from them at the expiration of the partnership (A. having pleaded his bankruptcy and certificate): Held, that B. might consider the sums paid by A. to plaintiff after the expiration of the partnership, as paid in reduction of the balance due at the expiration of the partnership, and might take credit for them without giving credit for any sums received after the expiration of the partnership by A. on account of plaintiff. *Brooke v. Enderby* 653

— 5. **Death of partner after expiration of partnership year, but before completion of account—Stipulation in articles.**—Partnership articles direct a yearly settlement on 25th March, and if a partner die his estate is to share in no profits subsequent to the last yearly settlement. The last settlement is on the 5th November, 1811, and a partner dies in February, 1813. His estate shares in profits up to the 5th November, 1812. *Pettyt v. Janeson* 259

— 6. **Evidence of Partnership.**—A bare denial of partnership is not a sufficient defence to a suit for partnership accounts. *Sanders v. King* 240

— 7. **Withdrawal of money from firm—Concealment.**—If a managing partner draws out monies, and conceals the fact, or disguises it in the partnership books, this is fraud, and proof may be made against his separate estate. Otherwise, if the transaction is duly entered in books. *Ex parte Smith, In re Hay* 224

— 8. **Release of one partner only.** See **Release**.

And see **Mortgage**, 2.

POOR LAW—1. **Settlement of pauper.**—A pauper, being settled by parentage in A., at the age of thirteen years, was hired and served for a year in A., and afterwards, when he was sixteen years old, returned to and lived with his father's family until he became of age: Held, that having

acquired a settlement of his own in A., he did not follow the settlement of his father subsequently gained in another parish. *R. v. The Inhabitants of Bleasby* 431

POOR LAW—2. **Poor rate**—**River navigation running through several parishes.**—Where a river navigation extended through several parishes, and certain tonnage dues became payable in respect of goods carried along the line of navigation, and landed at a wharf locally situate within the parish of B.: Held, that a rate on the proprietor, of those dues for their whole amount in the parish of B., stated to be for river tonnage, could not be considered as a rate upon that part of the river locally situate within the parish of B., but as a rate upon the parts of the river situate as well within as without the parish, and that it could not, therefore, be supported: Held, also, that the 41 Geo. III. c. 23, s. 1, does not give the Court of K. B. the power of amending a poor-rate. *R. v. Thomas Milton* 317

And see **Mandamus**, 1.

POWER—1. **Of leasing**—**Execution of.**—A power reserved upon a marriage settlement to tenants for life to grant or renew leases for lives, provided that a right of re-entry is reserved upon such leases for non-payment of rent, is well executed by a lease for lives providing a re-entry in case the rent remains in arrears fifteen days, and there is no sufficient distress on the premises. *Smith v. The Earl of Jersey* 19

— 2. — **Premium**—**Fraud of leases.**—H., tenant for life in settlement, was thereby empowered to make leases of lands in Ireland, at the best rent, without fine, and with the consent of trustees to raise money. The trustees consented that H. should, by mortgaging all or any part of the lands, or in any other way he should think fit, raise any sum not exceeding 5,000*l.* H. being in distress and involved in litigation, in consideration of 300*l.* and a rent grants to W., his solicitor, part of the lands in settlement upon a lease for lives. The grant and receipt stating that the 300*l.* was raised under a power and consent, as part of the 5,000*l.* were duly registered. The rent and premium, calculated at 6 per cent., were considerably below the annual value: Held, a good execution of the power, but void as fraudulently obtained by W. *Ward v. Hartpole* 61

— 3. **Of appointment**—**Share of appointee dying in appointee's lifetime.** See **Will**.

And see **Vendor and Purchaser**, 7.

PRACTICE—1. **Parties to action**—**Joinder of co-plaintiffs.**—In a suit concerning the inheritance of settled property, where the owner of the first estate of inheritance (a peer) had by a derivative settlement by way of trust reduced his estate to a tenancy for life, with an equitable contingent remainder over at his death to the person who should succeed to his peerage: Held, that the heir presumptive to the peerage was not a necessary party, and that the trustees of the settlement sufficiently represented the inheritance in the suit.

In a suit to redeem one of two distinct properties comprised in the same mortgage, the person entitled to redeem the other property should be made a defendant. Persons claiming to have alternative rights to redeem under conflicting titles cannot be joined as co-plaintiffs. *Cholmondeley v. Clinton*

84

— 2. **Payment into Court.**—If a sum be reported due, and exceptions are taken to the report, the money will not generally, on motion, be ordered to be paid into Court. *Creak v. Capell* 252

— 3. **Pleading.**—A defendant who seeks to resist discovery must negative any allegations which the plaintiff has made in support of his claim to treat the defendant as a partner. *Sanders v. King* 240

PRACTICE—4. Pleading—Misjoinder of issues.—A count in assumpsit against husband and wife, who was administratrix with the will annexed, upon promises by the testator to pay rent, cannot be joined with counts upon promises by the husband and wife, as administratrix, for use and occupation by them after the death of the testator. *Wigley v. Ashton*. 316

— 5. **Production of documents—Counsel's opinion.**—Opinion of counsel ordered to be produced, where it was taken by a tenant, with reference to his landlord's title, and where the case was stated for the benefit of both parties. *Att.-Gen. v. Berkeley*. 133

— 6. **Service of writ at stables.**—In ejectment for a stable service of the declaration, by nailing it to the door of the stable, no person being therein, and then going to the defendant's house and informing him of what had been done: Held, insufficient to ground a rule that the service be deemed good (R. S. C. Ord. IX. rr. 2, 9). *Doe d. Lovell v. Roe*. 814

[*And see Doe d. Tarluy v. Roe*, 815.]

— 7. **Non-service of order to answer appeal.**—An appeal, in which the essential parties are not served with the peremptory order to answer, and do not appear at the hearing, cannot proceed as against one of the respondents.

Agents and servants acting under general orders, but without the special direction of their master, having cut a tree on the side of a public road, which in falling killed a passenger, the widow and children of the person killed brought an action for damages against the master and the servants, in which action there was a judgment for the defendants. On appeal against this judgment, the agents and servants, as well as the master, were named as parties in the appeal, but were not served with the peremptory order to answer the appeal, nor brought before the House as parties at the hearing. The proceeding was held defective on this ground, as it would deprive the master of the remedy over or relief against the agents and servants, in case of a reversal of the judgment as against the master alone.

But the Lords, on hearing the argument *ex parte* against the absent respondents, affirmed the judgment of the Court below. *Linwood v. Hathorn*. 8

— 8. **Demurrer.** *See Solicitor and Client*, 3.

— 9. **Parties to action.** *See Ship and Shipping*, 1.

— 10. **Production of documents.** *See Solicitor and Client*, 2.

PRINCIPAL AND AGENT—Authority of factor.—A factor has an authority to sell for money, but not to barter. And therefore where a factor bartered the goods of his principal, no property passed, and the principal may maintain trover against the party with whom the goods are bartered, although the latter be wholly ignorant that he had been dealing with a factor only. *Guerreiro v. Peile*. 500

PRINCIPAL AND SURETY—1. Giving time to surety—Discharge of co-surety—Contribution between co-sureties.—A bank having discounted bills to the amount of 8,000*l.* which were dishonoured, the acceptors becoming bankrupts, agree with the drawers to retain the dishonoured bills, and receive the dividends which might become payable from the bankrupt estates; and, as additional security, to take four promissory notes, indorsed by four sureties, for 2,000*l.* each, to guarantee the unsatisfied bills, or any balance upon them which might remain unpaid, to the extent of 2,000*l.* each. This agreement having been carried into effect; when the notes were nearly due, upon the application of the original debtors for delay of payment, the bank gave up one of the promissory notes, and accepted a new one from the surety who had indorsed it; renewed notes were also given by two other of the sureties, and with the

fourth surety, a treaty was carried on, respecting a renewal, pending which he died. The dishonoured bills had also been delivered over by the bank to the original debtors, upon the treaty for the renewal of the notes :

Held, that the fourth surety and his estate, by the legal effect of the transaction, was discharged as to three-fourths, and liable only as to one-fourth, of the balance due upon the dishonoured bills, after giving credit for all monies received or receivable from any of the parties upon the bills, or their estates; and that, on payment of such fourth part of such balance, the bank were responsible to the estate of the fourth surety for all future dividends upon the dishonoured bills. *Stirling v. Forrester* . . . 69

PRINCIPAL AND SURETY—2. Giving time to surety.—Liability of sureties where they are not affected by an agreement by the creditor giving time to the principal debtor. *Prendergast v. Devey* . . . 254

— 3. Certificate as bar to action by surety. See *Bankruptcy*, 1.

PROMISSORY NOTE. See *Bill of Exchange*; *Principal and Surety*, 1.

QUARTER SESSIONS. See *Jurisdiction*; *Mandamus*.

QUO WARRANTO—Validity of election of county treasurer.—*Quo warranto* will not lie against a county treasurer to shew by what authority he holds the office, if he has been *de facto* elected by the justices in Quarter Sessions. *R. v. The Justices of Herefordshire* . . . 830

RATE—1. County rate—District situate within another county.—A district, situate within the local limits of the county of York, from time immemorial had been part of the county of Durham, yet had always contributed to the public burdens of the county of York: Held, that it was to be presumed that such district, either in the original division of land into counties, or at some subsequent period (when it was separated from the county of York), was made part of the county of Durham, on condition of its contributing to the burdens of the county of York, and that such district was liable to the county-rate of Yorkshire. *Johnson v. Dealtry* . . . 306

— 2. Sewers rate—Premises situate in royal dockyard.—A tenement situate in the king's dockyard, deriving a benefit from the public sewers, and occupied by an officer of government, who paid no rent, is liable to be rated to the sewers. *Netherton v. Ward* . . . 284

And see *Poor Law*, 2.

RECEIVER—Appointment of.—Receiver appointed on the motion of the vendor, pending a reference of title. *Boehm v. Wood* . . . 109

RELEASE—1. Of action by one of several co-plaintiffs.—*Plea puis darrein continuance* of release by one of several plaintiffs set aside without costs, on terms of indemnity against costs being given to the plaintiff who had released the action, though the consent of such plaintiff had not been obtained before action brought, it appearing that no consideration had been given for the release, and that the plaintiffs sued as trustees for the creditors of an insolvent person. *Mountstephen v. Brooke* . . . 805

— 2. Extending to one of two persons only.—A release was given by plaintiffs to A., one of two partners, with a provision that it should not prejudice any claims which plaintiffs might have against B., the other partner; and that in order to enforce the claims against B., it should be lawful for plaintiffs to sue A., either jointly with B. or separately. In an action by plaintiffs against A. and B., this release having been pleaded by A. and set out on oyer in the replication, with an averment that the action

was prosecuted against A. jointly with B., for the purpose of enabling plaintiffs to recover payment of monies due from B. and A. to plaintiffs, either out of the joint estate of B. and A., or from B. or his separate estate, the replication was demurred to, and the demurrer overruled. *Solly v. Forbes* 641

REVERSION—Improvident sale of post obit bonds.—*Post obit* bonds of W. a young man, put up to sale by him, without reserve, relieved against. *Fox v. Wright* 251

RIVER—Right to use public towing-path—Prescription.—A prescriptive right to a public towing-path, on the banks of a navigable tidal river, is not destroyed in consequence of that part of the river adjoining the towing-path having been converted by Act of Parliament into a floating harbour, although the towing-path was thereby subject to be used at all times of the tide; whereas, before, it was only used at those times when the tide was sufficiently high for the purposes of navigation: Held, secondly, that the prescription was not destroyed by a clause in the Act of Parliament, whereby the undertakers of the work were authorised to make a towing-path over land, comprising the towing-path in question, on paying a compensation to the owner of the soil, the effect of that being only to give him a compensation for any injury he may sustain by enlarging the then towing-path, or otherwise. *R. v. Tippet* 346

ROAD—Liability to repair.—Where, in an indictment against a township for non-repair of a road, the prescription stated and proved was, that its inhabitants had been immemorially used to repair all roads situate within it, which, but for such usage, would be repairable by the parish at large: Held, that this places the township in the situation of a parish, and that it is necessary for the defendants to shew by evidence some other persons in certainty who are liable, in order to deliver themselves from their liability to repair. *R. v. The Inhabitants of Hatfield* 631

SALE OF GOODS—1. Lien for wharfage.—The wharfage, &c. due upon goods imported was, by the course of trade, paid by the importer at the Christmas following the importation, whether the goods were in the mean time removed or not. The goods were sold to A., and, after Christmas, the merchant importer became bankrupt: Held, that there was no lien on the goods for the wharfage, &c. as against A. *Crawshay v. Homfray*. 618

— 2. Sale of horse—Acceptance—Statute of Frauds.—A. agreed to purchase a horse from B. for ready money, and to take him within a time agreed upon. About the expiration of that time, A. rode the horse, and gave directions as to its treatment, &c. but requested that it might remain in B.'s possession for a further time, at the expiration of which he promised to fetch it away and pay the price; to this B. assented. The horse died before A. paid the price or took it away: Held, that there was no acceptance of the horse within the meaning of the Statute of Frauds. *Tempest v. Fitzgerald* 526

And see Injunction, 2; Principal and Agent.

SCHOOL. See Charity, 4; Will, 3.

SETTLEMENT (MARRIAGE)—Power of leasing. See Power.

SEWERS RATE. See Rate, 2.

SHERIFF—1. Sale of tenant's goods under *fi. fa.*—Omission to retain rent due.—Where a sheriff, with knowledge that there is rent due to the landlord, proceeds to sell the tenant's goods by virtue of a writ of

f. fa. without retaining a year's rent, he will be liable for it, although no specific notice has been given to him by the landlord. *Andrews v. Dixon* 518

SHERIFF—2. Poundage. *See Extent*, 2.

And see Execution.

SHIP AND SHIPPING—1. Damage to goods—Action in name of consignee.—By a bill of lading, the captain was to deliver the goods for the consignor and in his name, to the consignee. At the time of shipment, the consignee had no property in the goods: Held, that an action against the ship-owners for damage done to the goods must be brought in the name of the consignor, although the consignee had insured the goods and advanced the premiums of insurance before the arrival of the ship. *Sargent v. Morris* 382

— 2. Lien for freight—Acceptance of bill—Waiver of lien.—Where the owner of a ship having a lien on the goods until the delivery of good and approved bills for the freight, took a bill of exchange in payment, and though he objected to it at the time, afterwards negotiated it: Held, that such negotiation amounted to an approval of the bill by him, and that it was a relinquishment of his lien on the goods. *Horncastle v. Farran* 461

— 3. Injunction to restrain sailing of ship. *See Injunction*, 2.

SLAVE TRADE—Action by foreigner for loss of slaves. *See Conflict of laws.*

SOLICITOR AND CLIENT—1. Confidential communications.—The privilege of professional communications between solicitor and client is not confined to communications made in the course of a suit. *Cromack v. Heathcote* 638

— 2. Production of documents—Privilege.—Privilege of solicitor and client extends to all communications for professional advice; but not to employment in matters not professional. *Walker v. Wildman* . . . 234

— 3. Costs—Cross bill by client—Set-off—A solicitor files his bill for foreclosure of an estate pledged as a security for costs. The client files a cross bill, alleging the costs demanded to have been occasioned by negligence and want of skill. Demurrer overruled on ground of equitable set-off. *Piggott v. Williams* 248

— 4. Lien for costs—Extends to money secured by documents in solicitor's possession.—The general lien for professional charges which a solicitor has upon his client's documents deposited with or held by him as solicitor, applies to money secured by those documents, and is not defeated or impaired by the payment of the money into Court in proceedings taken on behalf of the client for its recovery.

A solicitor's lien does not extend to debts that are not due to him in his professional character. *Worrall v. Johnson* 106

— 5. Papers not received in professional capacity.—Solicitor has a lien on papers delivered to him in that character, for all professional business, but no lien as a solicitor on papers delivered to him as steward. *Champervoux v. Scott* 248

— 6. Employment connected with professional character—Jurisdiction of Court to order account.—Where the employment of an attorney is so connected with his professional character as to afford a presumption that his employment was in consequence of that character, the Court will interfere in a summary way to compel him faithfully to execute the trust reposed in him; and therefore, where an attorney was employed by A. to collect and get in the effects due to him as administrator of another person, the Court compelled the attorney to render

an account to the executors of A. of the monies, &c. received by him, although he had never been employed by A. or his executors to conduct any suit in law or equity on his or their behalf. *In re Aitkin* . . . 616

SOLICITOR AND CLIENT—7. Negligence—Investigation of title—Action by administrator of client.—Plaintiff, as administrator, declared in assumpsit that defendant, for certain fees to be paid him by intestate, undertook as solicitor to investigate and see that a title about to be conveyed to intestate was a good one: breach, that he omitted to do so, and that intestate in consequence took an insufficient title, whereby his personal estate was injured. Defendant having demurred, the demurrer was overruled. *Knights v. Quarles* . . . 659

— 8. Client has no remedy for negligence on motion.—The Court will not interfere on motion against an attorney for negligence in the discharge of his professional duty, if there be no fraud. *In re Jones* . . . 824

— 9. Negligence—Omission to search register of stockholders. See Limitations, Statute of, 3.

— 10. Right to appear before magistrate.—A solicitor can only appear before a magistrate, on the hearing of a charge of felony, as a matter of courtesy. He cannot claim as of right to be present. *R. v. Borron* 447

— 11. Undertaking by solicitors to pay rent—Personal liability. See Guaranty, 2.

And see Defamation, 8.

SPECIFIC PERFORMANCE—Improvident contract.—Specific performance refused, of a contract improvidently entered into by ignorant persons.

Husband and wife having a joint power of appointment by deed, over the wife's estate, agree in writing to sell it. A specific performance cannot be compelled against them. *Martin v. Mitchell; Martin v. Peile* . . . 184

And see Vendor and Purchaser; Contract, 1.

SPRING GUN. See Nuisance.

TENANT FOR LIFE. See Landlord and Tenant, 2, 4.

TIMBER, ornamental, right to cut. See Waste.

TITHES—1. Of extra-parochial lands—Title of Crown to.—The tithes of all extra-parochial lands belong *jure coronæ* to the King; and the title of the Crown is not confined to such extra-parochial lands only, as were forest or parts of forest land. *Att.-Gen. v. Lord Eardley* . . . 697

— 2. Crown grant of extra-parochial lands—Whether passing tithes.—Where in a grant (*ex mero motu*, &c.) by the Crown, of extra-parochial lands, the words "tithes, oblations, and obventions," were found to have been introduced amongst the general words, they were held not to pass the tithes of such lands, in a case where it was in evidence that the tithes were in lease at the time of the grant, and that the Crown had continued to demise them whenever they had reverted; the Court determining that the continued exercise of such strong acts of ownership, was sufficient to counter-vail the slight effect of such words, even if where so introduced they were of any force at all, and were not rather attributable to mistake. *Ibid.*

TRESPASS—Justification.—A plea to an action of trespass for breaking plaintiff's close, that over and across, &c. was a common and public highway, for, &c. to pass along at pleasure, paying a certain toll, is not inconsistent or contradictory, particularly if not said to be immemorial, for it may be a highway created by statute. *Sutcliffe v. Greenwood* . . . 771

TROVER AND CONVERSION—**Exchequer bill**.—An Exchequer bill, the blank in which was not filled up, having been placed for sale in the hands of A., he, instead of selling it, deposited it at his bankers, who made him advances to the amount of its value. A. afterwards became bankrupt: Held, that the owner of the Exchequer bill could not maintain trover against the bankers, the property in such an Exchequer bill, like bank notes and bills of exchange indorsed in blank, passing by delivery. *Wookey v. Pole* 594

TRUST—1. **Liability of trustee**.—**Division of trust funds**.—Where it is a term of the trust that each trustee shall receive and be answerable only for a moiety, the Court will not extend the liability. *Birls v. Betty* 246

— 2. **Investment of accumulations**.—Lands were vested in trustees in trust, out of the receipts and profits, to make certain payments, and lay out the surplus upon mortgage or government security, with a view to accumulation; with a bequest of such accumulations. On a petition, a real estate contiguous to the real estate of the testator was permitted, under the circumstances, to be purchased, the same to be considered as personal property. *Webb v. Lord Shaftsbury* 249

UNLAWFUL ASSEMBLY—Evidence of objects of meeting. See Evidence, 7.

VENDOR AND PURCHASER—1. **Rescission of contract**.—**Purchase by auctioneer**.—**Lapse of time**.—An auctioneer employed to sell cannot on equitable principles be permitted to purchase the property himself. *Oliver v. Court* 720

— 2. — **Neglect to notify decision to rescind**.—The plaintiff agreed to take a house of the defendant for two years. Afterwards on the 4th September, 1817, he agreed to buy the estate of the vendor, in consideration of 25*l.* paid down and of the further sum of 425*l.* to be paid on the 25th December, 1817, on or before which time the conveyance was to be executed. An abstract was delivered on the 20th October, 1817, and afterwards, a draft of the conveyance, with the abstract, was sent to the plaintiff, with a note of the defendant's solicitor, stating that the deeds were with him, and desiring to hear from the plaintiff if any objections occurred; and many ineffectual applications were made to see the plaintiff. A notice was served on the plaintiff on the 22nd December, 1817, that the defendant would on the 23rd, 24th, and 26th, attend at the plaintiff's house to execute the conveyance, and, on default, he should consider the plaintiff as refusing to proceed in the purchase, and act accordingly. On the 2nd April, 1818, the plaintiff returned the abstract, with objections to the title. On the 13th, the defendant distrained on the plaintiff for rent. On a bill filed by the purchaser for a specific performance: Held, that the vendor should have given notice that he considered the agreement as at an end, and should have returned the 25*l.* *Reynolds v. Nelson* 225

— 3. **Compensation to purchaser with notice**.—Where the purchaser of charity land, with notice, expends money in buildings, is he entitled in equity to compensation? *Quære. Att.-Gen. v. Lloyd* 247

— 4. **Title**.—**Loss of deed recited in abstract**.—The loss of an old deed recited in an abstracted deed is not a defect of title where it does not appear that such deed would throw any reasonable doubt upon the vendor's title. *Prosser v. Watts* 238

— 5. — **Presumption of surrender of term**.—A term was created in 1711, for raising portions. There was no evidence of the portions being satisfied, but a settlement of the estate took place in 1744, and a recovery was suffered; and there was a covenant that the estate was free from incumbrances. No assignment appeared to have been at any time made of the

term. On an objection to the title by a purchaser: Held, that a surrender of the term must be presumed; and that in matters of presumption, the Court will bind a purchaser, where it would give a clear direction to a jury. *Emery v. Grocock* 236

VENDOR AND PURCHASER—6. Sale at valuation.—Where there is a contract to sell at a valuation by A. B. and C., the Court will compel the vendor to permit the valuation. The time of valuation is of the essence of the contract, but the defendant cannot take advantage of it, if he improperly occasion the delay. *Morse v. Merest* 226

— 7. Sale under decree—Departure from direction of Court.—A person purchasing lands under a decree is bound to see that the directions of the decree are observed.

Lands in strict settlement, with a power to grant leases, being subject to prior incumbrances, are, by a decree in a suit instituted by the incumbrancers, directed to be sold subject to the charges prior to the deed of settlement. Pending the suit, the tenant for life under the settlement grants leases not authorized by the power, and raises money upon annuities for his life, which he charges upon the lands, and they are sold subject to those charges: Held, on a suit by the remainderman in tail, that the sale, subject to charges not warranted by the decree, is void.

Where considerable delay has occurred in the prosecution of a suit, costs are not to be given, although the decree is reversed. *Colclough v. Sterum* 1

— 8. — Error in decree.—A purchaser of estates sold under a decree, was discharged, on motion, from his purchase, upon error in the decree being shown, though the parties were proceeding to rectify it.

It is not desirable to extend the rule compelling a purchaser to take the estate where a title is not made till after the contract. *Lechmere v. Brasier* 130

— 9. Surrender of copyholds.—Upon a sale in Court the vendor will be compelled to surrender a copyhold in person if it can be conveniently done. *Noel v. Weston* 235

VOLENTI NON FIT INJURIA. See Nuisance.

VOLUNTARY CONVEYANCE—1. Colourable qualification to kill game.—A conveyance executed for the purpose of giving the grantee a colourable qualification to kill game remains, without being made use of, in the custody of the grantor, and after his death, of his son. The grantee afterwards obtaining the possession of it, by representing that he intended by means of it to impose upon a third person, claims the estate. A court of equity will not grant relief to either party. *Brackenbury v. Brackenbury* 180

— 2. — Bill seeking relief upon the loss of a conveyance, executed to give a colourable qualification to kill game, retained for a year, with liberty to bring an action.

A conveyance executed by a father, to give a colourable qualification to his son, is kept in his possession during his life without being used, or made known to the son. Whether it is valid at law. *Qu.*

A voluntary deed, never parted with, and executed for a purpose that has never been completed, considered in equity as an imperfect instrument. *Cecil v. Butcher* 213

WASTE—Ornamental timber.—Timber left standing for ornament or shelter ought not to be cut, though decayed or injurious to adjoining trees, unless its removal is essential to intended purposes of ornament or shelter. *Lushington v. Boldero* 261

WILL—1. **Charge of debts.**—The words, "I will and direct that just debts, funeral and testamentary expenses, be paid and satisfied," in introductory part of a will, amount to a charge of the debts upon the estate. *Clifford v. Lewis*

— 2. — **Gift to charity.**—Grant of land void under 9 Geo. II. c. where there is a resulting trust for the grantor during his life.

Where the principal charity fails the accessory fails with it.

A several charity may be good though connected with a charity that fails. Where a residue is given to a valid purpose, it will fail with the prior purpose, if not capable of being ascertained except by the actual execution of that purpose. *Limbrey v. Gurr*

— 3. — **Gift to school—Mortmain Act.**—Devise of a house after death of A., for the use of the master that might be appointed to a school for the instruction of poor persons in W., and a bequest of money upon trust to apply the interest in procuring a master and mistress for instructing poor children, and in keeping the school-house in repair, and to apply the residue of the interest to the poor:

Held, that the bequest to the school was void as being connected with the devise of the house; and the amount intended for that purpose being uncertain, the gift of the residue was also void.

If an undefined proportion of a legacy is to be applied to a purpose void by the Statute of Mortmain, it vitiates the whole.

When the fund is applicable at discretion to several purposes, some of which are void and the others not, it will be confined to the latter.

A gift of the residue of a fund after the application of an undefined amount to a void charity, is void for uncertainty. *Attorney-General v. Hincks*

— 4. **Codicil—Devise "in trust as aforesaid"**—Codicil inconsistent with will.—A testator, by his will, devised all his real estates in several parishes to trustees, their heirs and assigns, for ever, upon trust to sell his estate at H. to pay his debts; and in case it should not be sufficient then, as to his estate at F. upon trust, to sell that also, to make good the deficiency; but in case it should not be necessary, then, as to his estate at F. and his other remaining estates in trust, to receive the rents and profits till his daughter came of age, and then to pay such of the rents and profits as had not been applied to her maintenance and education, together with the surplus money arising from the sale of his estate at F., if it should be sold, to his daughter, upon coming of age, and from that period to the use of the trustees for the life of his daughter, and after her death to the use of her children; and by a codicil to his will, in which he made an alteration as to the trustees, the testator devised to the new trustees therein named, and to the survivors and survivor of them, and the heirs of such survivor, "such estates as aforesaid, in trust as aforesaid." It appeared that the estate at H., when sold, was alone sufficient to pay the debts: Held, that the trustees, and the survivors and survivor of them, and the heirs of the survivor, took only an estate for the life of the daughter in the remaining estates at F. and elsewhere. *Hawker v. Hawker* 471

— 5. **Condition.**—A testator having devised his property in trust for his wife during widowhood, on condition that she should, neither directly, nor indirectly, keep or have any concern or interest in a public or licensed victualling house, or any other kind of business: Held, that the keeping and taking care of a public house belonging to other persons, as their servant, and at regular wages, and in the profits or emoluments of which she had no interest, was not such a breach of the condition as to create a forfeiture. *Jones v. Bromley* 256

— 6. — **Illegal trust.**—Bequest of leasehold property, with a condition to assign a part to a charity. The legatee takes, discharged of the condition. *Poor v. Mial* 227

WILL—7. Condition—Security for performance of condition.
Colston v. Morris 246

— 8. Gift to daughters and their children—**Absolute gift.**—**Gift** of residue to be equally divided between the testator's wife, sons, and daughters; subject nevertheless as to the shares of the daughters, which were to be placed in the funds in the names of trustees; the interest to be paid to them for their lives for their separate use, and after their deaths the testator gave the shares, to the interest of which his daughters should have been entitled for life, to their children equally, with benefit of survivorship. Two of the daughters having survived the testator, died without children: Held, that their representatives were entitled to their shares. *Whittell v. Dudin* 124

— 9. Direction to purchase estate—**Neglect of trustees—Dividends on sum appropriated for purchase.**—Where a testator directs a purchase with all convenient speed, and interest in the mean time to accumulate, and trustees neglect the purchase, twelve months is to be considered as a reasonable time within which the purchase might have been made. *Parry v. Warrington* 264

— 10. **Executory devise.**—A testator having a son and daughter, and the latter having several children, devised his lands, &c. to his son W. F. in fee; and if he should have no children, child, or issue, the estate was, on the decease of W. F., to become the property of the heir-at-law, subject to such legacies as W. F. might leave to the younger branches of the family: Held, that W. F. took, under this will, an estate in fee, with an executory devise over to the person, who on the happening of the event contemplated by the will, should become the heir-at-law of the testator. *Doe d. King v. Frost* 478

— 11. **Identity of beneficiary.**—A testator, by his will, devised to Matthew W., his brother, and Simon W., his brother's son, a certain estate. It appeared that the testator had three brothers, each of whom had a son of the name of Simon, living at the time of the testator's death: Held, that the proof of this fact did not raise any latent ambiguity in the will, so as to let in parol evidence of declarations of the testator, as to the person intended; it being clear, that the person entitled was Simon, son of Matthew. *Doe d. Westlake v. Westlake* 621

— 12. **Illegitimate child en ventre sa mère.**—A bequest to a child *en ventre sa mère*—introduced by reciting that the testator, "having two natural children, and the mother supposed to be now carrying a third child"—is a good bequest, although in the immediately subsequent parts of the will, the testator, referring to the previous bequest to the three children, call them indiscriminately *my* children, and *my* natural children as aforesaid. *Evans v. Massey* 691

— 13. **"Legal representatives."**—Legal representatives to be understood executors and administrators unless controlled by intention upon the whole instrument. *Price v. Strange* 266

— 14. **Mistake—Correction of will.**—Equity cannot correct wills upon the head of mistake, but follows the rule of law, that a deviser is to be taken to mean what he has expressed; but the Court may direct an issue, to inquire whether a particular expression found in the will forms part thereof. *Powell v. Mouchett* 276

— 15. **Mistake in name of devisee.**—Devise to S. D. for life, with remainder to the first son of S. D. in tail male, and in default of issue to his second son in tail male, and in default of his issue to the third, fourth, fifth, and sixth sons, in tail male, severally and successively, in remainder, one after another, in order and course as they respectively should be in seniority of age and priority of birth; the several and respective heirs male of all and

every son, every elder of such sons and his heirs male being preferred to and to take before the younger; and in default of such issue, then to the first, second, third, fourth, and all, &c. the daughters of S. D. and their issue, severally, successively, and in remainder, &c. as in the limitation to the sons, the elder being always preferred to and to take before the younger; and in default of any such issue, then to G. H. the eldest son of J. H. of Nottingham, for life, with limitations to his first and other sons and daughters similar to those to the children of S. D.; and in default of such issue, to S. H., second son of J. H. of Nottingham, for life, with precisely the same limitations to his first and other sons and daughters as in the preceding; and in default of such issue, to J. H. the third son of J. H. of Nottingham, for life; with remainder to his children, as in the preceding limitations. S. H. was in fact the third and J. H. the second son of J. H. of Nottingham: Held, that evidence of the state of the testator's family, and other circumstances, was admissible to shew whether he had mistaken the name of the devisee or not; and, upon such evidence being given, that it became a question of fact for the jury, whether the mistake was in the name or in the description. *Doe d. Le Chevalier v. Huthwaite* . . . 508

WILL—16. Mistake in name of devisee.—Misdescription of stock.—Bequest of 1,000*l.* long annuities "now standing in my name or in trust for me." At the date of the will, the testatrix had no long annuities, but had 1,000*l.* 3 per cent. reduced annuities: Held, that that sum passed by bequest. *Pentecost v. Ley* . . . 104

— 17. **Power of appointment—Share of appointee dying in appointor's lifetime.**—Bequest of 500*l.* to A. for her life, and at her decease to divide it in portions as she shall choose to her children; and if A. died before testatrix, to be equally divided amongst her children: Held, that the children of A. living at her death were the only objects of the power, and as such entitled to a share lapsed by the death of a child to whom it had been appointed.

A power to appoint the proportions in which definite objects are to take tacitly includes a gift to them in default of appointment. *Kennedy v. Kingston* . . . 197

— 18. **Royal grant of annuity secured on colonial revenue—Whether personalty or realty.**—By letters patent, 24 Car. II., the King granted to the use of A., his heirs and assigns for ever, an annuity of 1,000*l.*, to be paid out of his revenue of four and a half per cent. at Barbadoes and the Leeward Islands: Held, that this annuity was personal property, and duly passed under a will attested by two witnesses, by a residuary clause bequeathing all the rest, residue, and remainder of a testatrix's personalestate, of what nature or kind soever, to her executors. *Aubin v. Daly* . . . 623

— 19. **Revocation—Partial destruction of will by testator—Intention not to complete destruction.**—A testator being angry with one of the devisees named in his will, began to tear it, with the intention of destroying it; and having torn it into four pieces, was prevented from proceeding further, partly by the efforts of a by-stander, who seized his arms, and partly by the entreaties of the devisee. Upon this he became calm; and having put by the several pieces, he expressed his satisfaction that no material part of the writing had been injured, and that it was no worse: Held, that it was on these facts properly left to the jury to say whether he had completely finished all that he intended to do for the purpose of destroying the will; and the jury having found that he had not, the Court refused to disturb the verdict, and supported the will. *Doe d. Perkes v. Perkes* . . . 458

— 20. **Vesting of shares.**—Gift of personal property to trustees, to be settled on the marriages of the testator's daughters for their separate use, and on their deaths upon trust for their children, with a limitation over in the

event of either of the daughters dying without having been married, or without leaving any children her surviving.

The shares of the children of each daughter are vested, subject to be divested by all dying before their mother; and there being one alive at her death, the representative of two who died before her, held entitled to their shares. *Bromhead v. Hunt* 200

WITNESS—Question to as to belief in oath. *See Evidence*, 9.

WORDS—"In trust as aforesaid." *See Will*, 4.

— "Jettison." *See Insurance (Marine)*, 3.

— "Legal representatives." *See Will*, 13.

END OF VOL. XXII.



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